Dispositions for Criminal Traffic Violations

4

In this chapter. . .

If a juvenile is found to have violated a provision of the Motor Vehicle Code, the court may enter an order of disposition under MCL 712A.18. For other traffic-related violations, the court may also enter a dispositional order under MCL 712A.18. This chapter discusses several of the court's dispositional options under the Juvenile Code and the required procedures at a disposition hearing. It also discusses collection and allocation of restitution, the Crime Victim's Rights Fund Assessment, fines, costs, and other payments. In addition, a brief discussion of deferred proceedings for "minor in possession" violations is included.

4.1 Dispositions Under §18 of the Juvenile Code

MCL 712A.2b(c) states that, after hearing a charged violation of the Motor Vehicle Code or a substantially corresponding local ordinance, "if . . . the court finds the accusation to be true, the court may dispose of the case under [MCL 712A.18]." MCL 712A.18(1), in turn, provides that if the court finds that the juvenile does not come within the jurisdiction of the court, the court must dismiss the petition (or citation). If, however, the court finds that the juvenile is within the jurisdiction of the court, the court may order any of several types of disposition "appropriate for the welfare of the juvenile and society in view of the facts proven and ascertained." *Id.*

4.2 Required Procedures at Dispositional Hearings

*For a detailed discussion of the procedural requirements for dispositional hearings, see Miller, *Juvenile Justice Benchbook: Delinquency & Criminal Proceedings (Revised Edition)* (MJI, 2003), Chapter 10.

MCR 3.943(B) states that "[t]he interval between the plea of admission or trial and disposition, if any, is within the court's discretion. When the juvenile is detained, the interval may not be more than 35 days, except for good cause." In most cases involving a traffic offense by a juvenile, the factfinding hearing and the dispositional hearing will be conducted as a single hearing.*

MCR 3.943(C)(1)–(3) govern the admissibility of evidence at dispositional hearings. These rules state:

> "**(C) Evidence.**
>
> (1) The Michigan Rules of Evidence, other than those with respect to privileges, do not apply at dispositional hearings. All relevant and material evidence, including oral and written reports, may be received by the court and may be relied upon to the extent of its probative value, even though such evidence may not be admissible at trial.
>
> (2) The juvenile, or the juvenile's attorney, and the petitioner shall be afforded an opportunity to examine and controvert written reports so received and, in the court's discretion, may be allowed to cross-examine individuals making reports when such individuals are reasonably available.
>
> (3) No assertion of an evidentiary privilege, other than the privilege between attorney and client, shall prevent the receipt and use, at a dispositional hearing, of materials prepared pursuant to a court-ordered examination, interview, or course of treatment."

4.3 Victim Impact Statements

*The "juvenile article" of the CVRA applies to felonies and "serious misdemeanors." See Section 3.6 for a list of traffic-related "serious misdemeanors."

Notice of the right to submit an impact statement for inclusion in disposition report. Under the Crime Victim's Rights Act (CVRA),* a victim has the right to submit an oral or written impact statement if a disposition report is prepared. MCL 780.792(1) and (3). If a report is to be prepared, the person preparing the report must give the victim notice of the following:

> "(a) The victim's right to make an impact statement for use in preparing the report.
>
> "(b) The address and telephone number of the person who is to prepare the report.

> "(c) The fact that the report and any statement of the victim included in the report will be made available to the juvenile unless exempted from disclosure by the court." MCL 780.791(2)(a)–(c).

Oral victim impact statements. MCR 3.943(D)(2) states that "[t]he victim has the right to be present at the dispositional hearing and to make an impact statement as provided in the Crime Victim's Rights Act, MCL 780.751 *et seq*." In addition to or in lieu of providing impact information for inclusion in a dispositional report, a victim or a person designated by a victim may deliver an oral impact statement to the court at a disposition hearing. MCL 780.793(1) states:

> "The victim has the right to appear and make an oral impact statement at the juvenile's disposition or sentencing. If the victim is physically or emotionally unable to make the oral impact statement, the victim may designate any other person 18 years of age or older who is neither the defendant nor incarcerated to make the statement on his or her behalf. The other person need not be an attorney."

Note: If a person chosen by the victim will deliver the oral impact statement, the victim should provide his or her designee with a written statement to read to the court.

Contents of victim impact statements. MCL 780.791(3)(a)–(d) state that the victim's impact statements may include but are not limited to the following:

> "(a) An explanation of the nature and extent of any physical, psychological, or emotional harm or trauma suffered by the victim.
>
> "(b) An explanation of the extent of any economic loss or property damage suffered by the victim.
>
> "(c) An opinion of the need for and extent of restitution and whether the victim has applied for or received compensation for loss or damage.*
>
> "(d) The victim's recommendation for an appropriate disposition or sentence."

*See Section 4.5(A), below, for a detailed discussion of restitution.

In criminal cases, the court must give the victim "an opportunity to advise the court of any circumstances [he or she] believe[s] the court should consider in imposing sentence." MCR 6.425(D)(2)(c). See also *People v Steele,* 173 Mich App 502, 504–05 (1988) (although the victim's impact statements were emotional, they were within her statutory rights, and the defendant did not object to the statements).

Impact statements by third parties. In *People v Kisielewicz,* 156 Mich App 724, 728–29 (1986), the defendant was convicted of vehicular manslaughter. The presentence investigation report contained copies of letters from the deceased victim's parents, grandparents, aunt, uncle, and an attorney. The Court of Appeals held that the sentencing judge properly considered all of the letters. The letters from the deceased victim's parents were properly included in the PSIR under MCL 780.764 of the Crime Victim's Rights Act because the parents met the statutory definition of "victim." Although the other letters were not from "victims" as defined by statute, the letters concerned society's need to be protected from the offender, which is a valid sentencing consideration.

4.4 Dispositional Options

MCL 712A.18(1) provides that the court may order any of several types of disposition listed in §18 "appropriate for the welfare of the juvenile and society in view of the facts proven and ascertained." The following dispositional options are commonly imposed for violations of the Motor Vehicle Code. For discussion of all dispositional options open to a court, see Miller, *Juvenile Justice Benchbook: Delinquency & Criminal Proceedings* (MJI, 2003), Chapter 10.

A. Warning to Juvenile and Dismissal of Petition

*See Section 4.5(A).

The court may warn the juvenile or the juvenile's parents, guardian, or custodian and dismiss the petition. MCL 712A.18(1)(a). However, if appropriate, the court must order the juvenile and the juvenile's parents to make restitution pursuant to the Juvenile Code and the Crime Victim's Rights Act. MCL 712A.18(7).*

Also, if the court dismisses the petition at this stage of the proceedings, the offense will be recorded both on the juvenile's delinquency record maintained by the court and Department of State Police and on the juvenile's "master driving record" maintained by the Secretary of State.

B. In-Home Probation

MCL 712A.18(1)(b) states in part that a court may

> "[p]lace the juvenile on probation, or under supervision in the juvenile's own home or in the home of an adult who is related to the juvenile. As used in this subdivision, 'related' means an individual who is at least 18 years of age and related to the child by blood, marriage, or adoption, as grandparent, great-grandparent, great-great-grandparent, aunt or uncle, great-aunt or great-uncle, great-great-aunt or great-great-uncle, sibling, stepsibling,

> nephew or niece, first cousin or first cousin once removed, and the spouse of any of the above, even after the marriage has ended by death or divorce."

MCL 712A.18(1)(b) also requires the court to order terms and conditions of probation, including rules governing the conduct of parents, guardians, or custodians. "The court shall order the terms and conditions of probation or supervision, including reasonable rules for the conduct of the parents, guardian, or custodian, if any, as the court deems necessary for the physical, mental, or moral well-being and behavior of the juvenile." *Id.**

* See subsection (C) for further discussion of the court's authority to enter orders concerning adults.

The court shall require the juvenile to pay the minimum state cost* prescribed in MCL 712A.18m as a condition of the juvenile's probation or supervision. MCL 712A.18(1)(b).

*See subsection (F) for discussion of "minimum state costs."

Drug treatment court. A court may order a juvenile to participate in a drug treatment court as described in MCL 600.1060 et seq. MCL 712A.18(1)(b)

C. Orders Directed to Parents and Other Adults

Orders to refrain from conduct harmful to the juvenile. The court may order the parents, guardian, custodian, or any other person to refrain from continuing conduct that the court determines has caused or tended to cause the juvenile to come within or to remain under the court's jurisdiction, or that obstructs placement or commitment of the juvenile pursuant to a dispositional order. MCL 712A.18(1)(g). See also MCL 712A.6 (Family Division has jurisdiction over adults and may make such orders affecting adults the court finds necessary for physical, mental, or moral well-being of children under its jurisdiction).

In *In re Macomber,* 436 Mich 386, 393, 398 (1990), the Michigan Supreme Court found that the trial court's authority to make dispositional orders extends beyond remedies listed in MCL 712A.18. The Court stated the following:

> "Thus, we hold that the Legislature has conferred very broad authority to the probate court. There are no limits to the 'conduct' [under MCL 712A.18(1)(g)] which the court might find harmful to a child. The Legislature intended that the court be free to define 'conduct' as it chooses. Moreover, in light of the directive that these provisions are to be 'liberally construed' [under MCL 712A.1(3)] in favor of allowing a child to remain in the home, we find these sections supportive of the court's order prohibiting the father from living with his daughter." *Macomber, supra* at 393.

Order to parent or guardian to participate in treatment. The court may order the juvenile's parent or guardian to personally participate in treatment reasonably available in the parent's or guardian's location. MCL 712A.18(1)(k).

Drug treatment court. A court has the authority to order a juvenile and his or her parents to participate in a drug treatment court. MCL 712A.6. See MCL 600.1060 et seq. for drug treatment court procedures.

Notice and hearing requirements. "An order directed to a parent or a person other than the juvenile is not effective and binding on the parent or other person unless opportunity for hearing is given by issuance of summons or notice as provided in sections 12 and 13 of [the Juvenile Code] and until a copy of the order, bearing the seal of the court, is served on the parent or other person as provided in section 13 of [the Juvenile Code]." MCL 712A.18(4).

> **Note:** It may be very helpful for the judge or referee conducting the dispositional hearing to obtain a waiver on the record of these service requirements.

D. Community Service

The court may order the juvenile to engage in community service. MCL 712A.18(1)(i).

E. Civil Fines

The court may order the juvenile to pay a civil fine in the amount of the penal fine provided by the ordinance or law that was violated by the juvenile. MCL 712A.18(1)(j).

"Fines, costs, and other financial obligations imposed by the court must be paid at the time of assessment, except when the court allows otherwise, for good cause shown." MCR 1.110.

A fine imposed for a felony, misdemeanor, or ordinance violation must not be waived unless costs, other than the minimum state cost, are waived. MCL 712A.18m(3).

F. Minimum State Costs

"If a juvenile is within the court's jurisdiction under [MCL 712A.2(a)(1) for a violation of a criminal law], the court shall order the juvenile to pay costs as provided in [MCL 712A.18m]." A court must order a juvenile to pay minimum state costs only if the court also orders the juvenile to pay other fines, costs, restitution, assessments, or other payments. MCL 712A.18m states:

> "(1) If a juvenile is within the court's jurisdiction under section 2(a)(1) of this chapter, and is ordered to pay any combination of fines, costs, restitution, assessments or other payments arising out of the same juvenile proceeding, the court shall order the juvenile to pay costs of not less than the following amount, as applicable:
>
> > "(a) $60.00, if the juvenile is found to be within the court's jurisdiction for a felony.
> >
> > "(b) $45.00, if the juvenile is found to be within the court's jurisdiction for a serious misdemeanor or a specified misdemeanor.*
> >
> > "(c) $40.00, if the juvenile is found to be within the court's jurisdiction for a misdemeanor not described in subdivision (b) or of an ordinance violation." MCL 712A.18m(1)(a)–(c).

*See Section 4.5(B), below, for a list of traffic- and alcohol-related "serious" and "specified misdemeanors."

A juvenile may petition the court for remission of unpaid minimum state costs. MCL 712A.18(19) states:

> "(19) A juvenile who has been ordered to pay the minimum state cost as provided in section 18m of this chapter as a condition of probation or supervision and who is not in willful default of the payment of the minimum state cost may petition the court at any time for a remission of the payment of any unpaid portion of the minimum state cost. If the court determines that payment of the amount due will impose a manifest hardship on the juvenile or his or her immediate family, the court may remit all or part of the amount of the minimum state cost due or modify the method of payment."

4.5 Restitution, Crime Victim's Rights Assessment, and Reimbursement of Costs of Service

A. Restitution

Offenses. Restitution is authorized under MCL 780.794–780.795 and MCL 712A.30–712A.31.* The Crime Victim's Rights Act (CVRA) requires restitution for any criminal offense. MCL 780.794(2) requires a court to order restitution at the disposition or sentencing hearing for an "offense." MCL 780.794(1)(a) defines "offense" as "a violation of a penal law of this state or a violation of an ordinance of a local unit of government of this state punishable by imprisonment or by a fine that is not a civil fine."

*For a more detailed discussion of restitution, see Miller, *Crime Victim Rights Manual (Revised Edition)* (MJI, 2005), Chapter 10.

MCL 780.794(2) states as follows:

> "Except as provided in subsection (8), at the dispositional hearing or sentencing for an offense, the court shall order, in addition to or in lieu of any other disposition or penalty authorized by law, that the juvenile make full restitution to any victim of the juvenile's course of conduct that gives rise to the disposition or conviction or to the victim's estate. For an offense that is resolved informally by means of a consent calendar diversion or any other informal method that does not result in a dispositional hearing, the court shall order the restitution required under this section."

Pending civil litigation between the victim and offender is an insufficient reason for ordering less than full restitution. The amount of restitution paid to the victim must be set off against any amount the victim recovers as compensatory damages in a civil suit against the defendant or juvenile. *People v Avignone,* 198 Mich App 419, 423 (1993).

In *People v Gahan,* 456 Mich 264, 272 (1997), the Michigan Supreme Court held that the phrase "any victim of the defendant's course of conduct" should be given the broad meaning that was intended by the Legislature. The Court concluded that "the defendant should compensate for all the losses attributable to the illegal scheme that culminated in his conviction, even though some of the losses were not the factual foundation of the charge that resulted in conviction." See also *People v Persails,* 192 Mich App 380, 383 (1991) (the defendant was properly ordered to pay restitution for uncharged offenses where a plea bargain was likely motivated by dismissal of those offenses).

"Victim" defined. For purposes of restitution, "victim" is defined as an individual who suffers direct or threatened physical, financial, or emotional harm as a result of an offense, or a sole proprietorship, partnership, corporation, association, governmental entity, or any other legal entity that suffers direct physical or financial harm as a result of an offense. MCL 780.794(1)(b).

The definition of "victim" excludes individuals charged with offenses arising out of the same transaction as the charge against the juvenile. MCL 780.781(3). Thus, a person charged with an offense arising out of the same transaction as the charge against the juvenile is ineligible for restitution.

The CVRA contains no provision that allows a court to consider victim fault when ordering restitution. See *People v Clinton,* 890 P2d 74, 75 (Ariz App, 1995) (because only a person accused of a crime or in custody for a crime are excluded from the definition of "victim," the trial court erred in denying restitution to a victim who supplied alcohol to the driver of a vehicle later involved in an accident that severely injured the victim).

The court may not order restitution to a government agency for routine costs of investigating and prosecuting crimes. *People v Newton*, 257 Mich App 61, 69–70 (2003). The *Newton* Court concluded that the general costs of a criminal investigation are not "direct [ ] financial harm" caused by a defendant's crime and thus are not expenses for which a defendant may be made to pay restitution. In *Newton*, the defendant was convicted of selling alcohol without a license from a barn on the defendant's property where parties were frequently held and informally advertised. The *Newton* Court held that "the cost of the investigation would have been incurred without regard to whether defendant was found to have engaged in criminal activity." *Id.* at 69.

> **Note:** MCL 769.1f authorizes a court to order an offender to reimburse state or local units of government for the costs of emergency response and prosecution related to commission of an offense listed in the statute. Many traffic- and alcohol-related offenses are listed in the statute. See MCL 769.1f(1).

In all cases, the court must order restitution to individuals or entities (including insurance companies) that have compensated the victim for losses incurred due to the offender's course of conduct. MCL 780.794(8) states as follows:

> "The court shall order restitution to the crime victim services commission or to any individuals, partnerships, corporations, associations, governmental entities, or other legal entities that have compensated the victim or the victim's estate for a loss incurred by the victim to the extent of the compensation paid for that loss. The court shall also order restitution for the costs of services provided to persons or entities that have provided services to the victim as a result of the crime. Services that are subject to restitution under this subsection include, but are not limited to, shelter, food, clothing, and transportation. However, an order of restitution shall require that all restitution to a victim or victim's estate under the order be made before any restitution to any other person or entity under that order is made. The court shall not order restitution to be paid to a victim or victim's estate if the victim or victim's estate has received or is to receive compensation for that loss, and the court shall state on the record with specificity the reasons for its action."

This provision allows the court to order restitution to insurance companies or to the State of Michigan to the extent that they have compensated the victim for his or her loss. See *People v Washpun,* 175 Mich App 420, 423 (1989) (prior to the statutory amendment that added the section quoted above, the Legislature intended insurance companies to receive restitution under the CVRA to the extent that they compensated victims for losses arising from

crimes), *People v Orweller,* 197 Mich App 136, 139–40 (1992) (the State of Michigan may be subrogated to an insurance company or victim for amounts paid by the state under the Motor Vehicle Accident Claims Act, MCL 257.1101 et seq., which allows for state reimbursement of losses caused by uninsured motorists), and *People v Byard,* ___ Mich App ___ (2005) (the Michigan Catastrophic Claims Association, a private association funded by Michigan drivers that compensates insurance companies for no-fault medical claims exceeding $250,000.00, may be subrogated to an insurance company). An individual or entity that has compensated a victim need not file a claim to receive restitution under MCL 780.794(8). *Byard, supra.*

Calculating loss for property damage. If an offense results in damage to or loss or destruction of a victim's property, or if it results in the seizure or impoundment of a victim's property, the court may order the juvenile to pay restitution to the victim. The relevant statutory provisions, MCL 780.794(3)(a)–(c), determine the amount of restitution to be ordered in such cases. These provisions state that the court may order the juvenile to do one or more of the following:

> "(a) Return the property to the owner of the property or to a person designated by the owner.
>
> "(b) If return of the property under subdivision (a) is impossible, impractical, or inadequate, pay an amount equal to the greater of subparagraph (*i*) or (*ii*), less the value, determined as of the date the property is returned, of that property or any part of the property that is returned:
>
> > (*i*) The value of the property on the date of the damage, loss, or destruction.
> >
> > (*ii*) The value of the property on the date of disposition.
>
> "(c) Pay the costs of the seizure or impoundment, or both."

Thus, the court may order the juvenile to return the property to the victim or the victim's designee. If return of the property is impossible, impractical, or inadequate, the court may order the juvenile to pay the value of the property on the day it was damaged, lost, or destroyed (if the value of the property has depreciated or remained the same) or the value of the property at disposition (if the property has appreciated in value), less the value of any property returned to the victim. In addition, the court may order the juvenile to pay the costs of seizure, impoundment, or both.

Calculating expenses related to physical or psychological injury. If an offense results in physical or psychological injury to a victim, the court may order the juvenile to pay restitution for professional services and devices, physical and occupational therapy, lost income, medical and psychological treatment for the victim's family, and homemaking and child care expenses.

MCL 780.794(4)(a)–(e) state that the court may order the juvenile to do one or more of the following, as applicable:

> "(a) Pay an amount equal to the reasonably determined cost of medical and related professional services and devices actually incurred and reasonably expected to be incurred relating to physical and psychological care.
>
> "(b) Pay an amount equal to the reasonably determined cost of physical and occupational therapy and rehabilitation actually incurred and reasonably expected to be incurred.
>
> "(c) Reimburse the victim or the victim's estate for after-tax income loss suffered by the victim as a result of the offense.
>
> "(d) Pay an amount equal to the reasonably determined cost of psychological and medical treatment for members of the victim's family actually incurred and reasonably expected to be incurred as a result of the offense.
>
> "(e) Pay an amount equal to the reasonably determined costs of homemaking and child care expenses actually incurred and reasonably expected to be incurred as a result of the offense or, if homemaking or child care is provided without compensation by a relative, friend, or any other person, an amount equal to the costs that would reasonably be incurred as a result of the offense for that homemaking and child care, based on the rates in the area for comparable services."

The amount of restitution for professional services and devices, physical and occupational therapy, medical and psychological treatment for the victim's family, and homemaking and child care expenses must be reasonably determined and include both expenses actually incurred and reasonably expected to be incurred. Thus, "prospective" restitution may be ordered.

Calculating expenses related to the victim's death. If criminal conduct results in the death of a victim, the court must order the restitution to be paid to the victim's estate. MCL 780.794(7). The court may order restitution in "an amount equal to the cost of actual funeral and related services." MCL 780.794(4)(f). The court may also order a juvenile to reimburse a victim's parent or guardian for a lost tax deduction or credit. MCL 780.794(4)(g) states:

> "If the deceased victim could be claimed as a dependent by his or her parent or guardian on the parent's or guardian's federal, state, or local income tax returns, pay an amount

> equal to the loss of the tax deduction or tax credit. The amount of reimbursement shall be estimated for each year the victim could reasonably be claimed as a dependent."

Triple restitution for serious bodily impairment or death of a victim. If criminal conduct causing bodily injury to the victim also results in the serious impairment of a body function or the death of that victim, the court may order up to three times the amount of restitution otherwise allowed under the CVRA. MCL 780.794(5). A court may order up to triple the amount of any other restitution allowed under the CVRA, including restitution payable to insurance companies that have compensated the direct victim for losses incurred as a result of the offense. *People v Byard,* ___ Mich App ___ (2005). In *Byard,* the defendant was convicted of operating a motor vehicle while visibly impaied causing serious injury. It was undisputed that the victim suffered a serious impairment of body function. Defendant was ordered to pay $659,128.09 to an insurance company and $280,000.00 to the direct victim of the offense, $250,000.00 of which was for "pain and suffering under MCL 780.766(5)." The Court of Appeals upheld the restitution order, stating:

> "Defendant says that, because the victim did not suffer any out-of-pocket expenses, no restitution was 'otherwise allowed under this section.' MCL 780.766(5). However, the trial court ordered defendant to pay $659,128.09 to Allstate Insurance Company for medical expenses and lost wages paid for the victim. MCL 780.766(4)(a) & (c) allows a court to award restitution for medical bills and lost wages. MCL 780.766(8) allows courts to award restitution to any person, government entity, or business or legal entity which compensates the victim for losses arising out of a defendant's criminal conduct. Therefore, the award of restitution to Allstate was restitution 'otherwise allowed under this section,' and the $659,128.09 award could potentially be tripled under MCL 780.766(5). Thus, the trial court did not err when it awarded $250,000 to the victim under MCL 780.766(5)." *Byard, supra.*

"Serious impairment of a body function." "Serious impairment of a body function" includes but is not limited to the following:

> "(a) Loss of a limb or use of a limb.
>
> "(b) Loss of a hand or foot or use of a hand or foot.
>
> "(c) Loss of an eye or use of an eye or ear.
>
> "(d) Loss or substantial impairment of a bodily function.
>
> "(e) Serious visible disfigurement.

> "(f) A comatose state that lasts for more than 3 days.
>
> "(g) Measurable brain damage or mental impairment.
>
> "(h) A skull fracture or other serious bone fracture.
>
> "(i) Subdural hemorrhage or subdural hematoma.
>
> "(j) Loss of a body organ." MCL 780.794(5)(a)–(j).

According to the Michigan Court of Appeals in *People v Thomas*, 263 Mich App 70, 74–76 (2004), the phrase "serious impairment of a body function" as it is defined in the no-fault act, MCL 500.3135(1), is not relevant to a court's analysis of an injury resulting from a defendant's violation of MCL 750.81d(3)—resisting arrest and causing the police officer serious bodily impairment. The no-fault act's definition of the phrase and case law based on that interpretation are not applicable to circumstances like those in *Thomas* because MCL 750.81d(7)(c) expressly provides that "serious impairment of a body function" is to be defined as the phrase is defined in MCL 257.58c.

The definition of "serious impairment of a body function" in MCL 257.58c is substantially similar to the definitions of this term in the provisions of the CVRA authorizing triple restitution for victims who sustain a serious bodily impairment as a result of an offender's criminal conduct. In *Thomas*, the Court of Appeals rejected both parties' assertion that the no-fault statute should be considered "in pari materia" with the definition in MCL 257.58c. The *Thomas* Court explained that the doctrine of "in pari materia" was inapplicable because

> "[t]he two statutes [MCL 257.58c and 500.3135(1)] do not relate to the same subject or share a common purpose. The no-fault act provides a system of civil compensation and liability for automobile accidents; the statute at issue [in *Thomas*] prohibits and criminalizes assaultive behavior while resisting an arrest." *Thomas, supra* at 75.

The Court also noted that a court may not look outside the statute at issue when, as in *Thomas*, the definitions of terms relevant to the dispute are provided in the statute itself. Thus, in *Thomas*, it was improper to consider the no-fault act's definition of "serious impairment of a body function" because MCL 750.81d(7) provided the definition of the phrase by direct reference to MCL 257.58c. Similarly, the statutory provisions governing triple restitution in cases involving serious bodily impairment under the CVRA contain a definition of the phrase so that reference to the no-fault act's definition is improper.

Because the definition of "serious bodily impairment" used in MCL 750.81d(7)—the phrase as defined in MCL 257.58c—is substantially similar to the definitions used throughout the CVRA, the *Thomas* Court's disposition

of the issue is relevant to cases under the CVRA involving the interpretation of "serious bodily impairment." The CVRA's definitions of the phrase are prefaced with "serious impairment of a body function includes, but is not limited to" the specific list of injuries included in the definitions. According to the *Thomas* Court:

> "[T]o determine whether injuries to the officer here constitute serious impairments of a body function under the statute, we consider their similarity to injuries within the statutory list." *Thomas, supra* at 76.

The same analysis applies to a determination of serious bodily impairment under the triple restitution provisions of the CVRA.

Ordering a juvenile's parent to pay restitution. The court may order a juvenile's parent to pay some or all of the restitution owed to the victim. MCL 780.794(15). The juvenile's parent must be given an opportunity to be heard on the issue. The relevant statutory provision states:

> "If the court determines that a juvenile is or will be unable to pay all of the restitution ordered, after notice to the juvenile's parent or parents and an opportunity for the parent or parents to be heard the court may order the parent or parents having supervisory responsibility for the juvenile at the time of the acts upon which an order of restitution is based to pay any portion of the restitution ordered that is outstanding. An order under this subsection does not relieve the juvenile of his or her obligation to pay restitution as ordered, but the amount owed by the juvenile shall be offset by any amount paid by his or her parent. As used in this subsection, 'parent' does not include a foster parent." *Id.*

The court must "take into account the parent's financial resources and the burden that the payment of restitution will impose, with due regard to any other moral or legal financial obligations the parent may have." MCL 780.794(16). If a parent is required to pay restitution, the court must order payment to be made in specified installments *and* within a specified period of time. *Id.* [Emphasis added.] When the juvenile is ordered to pay restitution, the court may order payment in specified installments *or* within a specified period of time. MCL 780.794(10).

An order directed to a parent shall not be binding unless the parent has been given an opportunity for a hearing pursuant to the issuance of a summons or notice as provided in MCL 712A.12 and MCL 712A.13. MCL 712A.18(4). The order, bearing the seal of the court, must be served on the parent or other person as required by MCL 712A.13. MCL 712A.18(4).

A parent who has been ordered to pay restitution may petition the court for a modification of the amount of restitution owed by that parent or for a cancellation of any unpaid portion of that parent's obligation. The court must "cancel all or part of the parent's obligation due if the court determines that payment of the amount due will impose a manifest hardship on the parent and if the court also determines that modifying the method of payment will not impose a manifest hardship on the victim." MCL 780.794(17).

B. Crime Victim's Rights Fund Assessment

When a juvenile offender is found responsible for an enumerated offense, the court must order the juvenile to pay a "crime victim's rights fund assessment." MCL 712A.18(12). Each juvenile for whom an order of disposition is entered for a "juvenile offense" must pay an assessment of $20.00. MCL 780.905(2).

The court may only order one "crime victim's rights fund assessment" per juvenile case. *Id.* "If the court enters an order pursuant to the Crime Victim's Rights Act, MCL 780.751, et seq., the court shall only order the payment of one assessment at any dispositional hearing, regardless of the number of offenses." MCR 3.943(E)(5).

"Fines, costs, and other financial obligations imposed by the court must be paid at the time of assessment, except when the court allows otherwise, for good cause shown." MCR 1.110.

Felony, "serious misdemeanor," "specified misdemeanor," and "juvenile offense" defined. For purposes of the "crime victim's rights fund assessment," a "juvenile offense" is defined as an offense that if committed by an adult would be a felony, "serious misdemeanor," or "specified misdemeanor." MCL 780.901(f). A felony is an offense punishable by imprisonment for more than one year, or an offense expressly designated by law as a felony. MCL 780.901(d). "Serious misdemeanors" are listed in MCL 780.811(1)(a). MCL 780.901(g). The "serious misdemeanors" involving traffic or alcohol-related offenses are:

- leaving the scene of a personal-injury accident, MCL 257.617a;
- operating a vehicle while under the influence of or impaired by intoxicating liquor or a controlled substance, or with an unlawful blood-alcohol content, MCL 257.625, if the violation involves an accident resulting in damage to another individual's property or physical injury or death to another individual;
- selling or furnishing alcoholic liquor to an individual less than 21 years of age, MCL 436.1701, if the violation results in physical injury or death to any individual;
- operating a vessel while under the influence of or impaired by intoxicating liquor or a controlled substance, or with an unlawful blood-alcohol content, MCL 324.80176(1) or (3), if the violation

involves an accident resulting in damage to another individual's property or physical injury or death to any individual;

- a violation of a local ordinance substantially corresponding to a violation listed above; and
- A charged felony or serious misdemeanor that is subsequently reduced or pled to a misdemeanor.

"Specified misdemeanors" are listed in MCL 780.901(h). Relevant "specified misdemeanors" are misdemeanor violations of any of the following:

*All violations of MCL 257.602a are felonies.

- fleeing and eluding a police or conservation officer, MCL 257.602a;*
- driving while intoxicated or visibly impaired, MCL 257.625(1) or (3);
- reckless driving, MCL 257.626;
- driving without a valid license, MCL 257.904;
- operating a snowmobile while intoxicated or visibly impaired, MCL 324.82127(1) or (3);
- operating an off-road vehicle while intoxicated, MCL 324.81134(1) or (2);
- operating an off-road vehicle while visibly impaired, MCL 324.81135;
- operating a vessel while intoxicated or visibly impaired, MCL 324.80176(1) or (3);
- operating an aircraft while under the influence of intoxicating liquor or controlled substance, MCL 259.185;
- controlled substance violations, MCL 333.7401 to 333.7461 and 333.17766a;
- selling or furnishing alcoholic liquor to an individual less than 21 years of age, MCL 436.1701;
- operating a locomotive while under the influence of intoxicating liquor or controlled substance, MCL 462.353;
- operating a locomotive while visibly impaired, MCL 462.355;
- larceny of a rented vehicle, MCL 750.362a;
- fleeing and eluding a police or conservation officer, MCL 750.479a(6);

- a local ordinance substantially corresponding to a violation listed above.

C. Reimbursement of Costs of Service

An order of disposition placing a juvenile on probation in the juvenile's own home may contain a provision for the reimbursement by the juvenile, parent, guardian, or custodian to the court for the cost of service. If an order is entered under this subsection, an amount due shall be determined and treated in the same manner provided for an order under MCL 712A.18(2), dealing with reimbursement for cost of care outside the juvenile's own home. MCL 712A.18(3).*

*See Miller, *Juvenile Justice Benchbook: Delinquency & Criminal Proceedings (Revised Edition)* (MJI, 2003), Section 11.2, for further discussion.

4.6 Allocation of Money Collected for Payment of Fines, Costs, Restitution, Assessments, or Other Payments

A juvenile and his or her parent or guardian may be ordered to pay restitution, costs, fines, probation supervision fees, and other payments or assessments. Typically, the juvenile and his or her parent or guardian make incremental payments to the court rather than paying all of the restitution, costs, fines, fees, and assessments at once. When the court receives a payment from the juvenile or his or her parent or guardian, the court must allocate the money pursuant to statute. The allocation of all monies received from the juvenile and his or her parent or guardian is discussed below.

MCL 780.905(5) states that "[i]f a person is subject to any combination of fines, costs, restitution, assessments, or payments arising out of the same . . . juvenile proceeding," the money collected from that person must be distributed as required by MCL 712A.29. See also MCL 712A.29(1) (money collected from a juvenile's parents must be distributed according to MCL 712A.29) and MCL 780.794a (substantially similar provision in the Crime Victim's Rights Act).

Note that the statutory scheme explained in this section applies only to traffic offenses adjudicated in the Family Division of Circuit Court. The fines, costs, and assessments collected following the adjudication of a civil infraction in district or municipal court are allocated pursuant to MCL 257.909 (fines for violations of the Motor Vehicle Code or other state statute), MCL 600.8379 (fines for violations of local ordinances substantially corresponding to a provision of the Motor Vehicle Code), MCL 257.907(4) (costs), and MCL 257.907(14) and MCL 257.629e (assessments).

Under MCL 712A.29, each payment made by a juvenile or his or her parents for victim payments, fines, costs, assessments, or other assessments or payments must be allocated as follows:

- Fifty percent of the money must be applied to victim payments. MCL 712A.29(2). "Victim payments" mean restitution ordered to be paid to the victim or victim's estate but not to an individual or entity that has reimbursed a victim for losses arising from the offense, and assessments paid to the Crime Victim's Rights Fund. MCL 712A.29(7).

- In cases involving orders of disposition for offenses that would be violations of state law if committed by an adult, the remaining money must be applied in the following descending order of priority:

  — minimum state cost;

  — other costs;

  — fines;

  — assessments (other than the "crime victim's rights assessment") and other payments. MCL 712A.29(3).

- In cases involving orders of disposition for offenses that would be violations of local ordinances if committed by an adult, the remaining money collected must be applied in the following descending order of priority:

  — minimum state cost;

  — fines and other costs;

  — assessments (other than the "crime victim's rights assessment") and other payments. MCL 712A.29(4).

4.7 Deferred Proceedings Under MCL 436.1703(3)

*The statutory provisions discussed in this section became effective September 1, 2004. See 2004 PA 63.

MCL 436.1703(3) permits a court to defer proceedings regarding a first-time violator of MCL 436.1703(1), which prohibits a minor from purchasing, consuming, or possessing alcoholic liquor, or from having any bodily alcohol content.* MCL 436.1703(3) states in part:

> "(3) When an individual who has not previously been convicted of or received a juvenile adjudication for a violation of subsection (1) pleads guilty to a violation of subsection (1) or offers a plea of admission in a juvenile delinquency proceeding for a violation of subsection (1), the court, without entering a judgment of guilt in a criminal proceeding or a determination in a juvenile delinquency proceeding that the juvenile has committed the offense and with the consent of the accused, may defer further

> proceedings and place the individual on probation upon terms and conditions that include, but are not limited to, the sanctions set forth in subsection (1)(a), payment of the costs including minimum state cost as provided for in section 18m of chapter XIIA of the probate code of 1939, 1939 PA 288, MCL 712A.18m, and section 1j of chapter IX of the code of criminal procedure, 1927 PA 175, MCL 769.1j, and the costs of probation as prescribed in section 3 of chapter XI of the code of criminal procedure, 1927 PA 175, MCL 771.3."

If the court determines that the juvenile is using this procedure in another court, or if the juvenile violates a condition of probation, the court may find that the juvenile has committed the charged violation of MCL 436.1703(1) and proceed to disposition. MCL 436.1703(3).

If the juvenile fulfills the terms and conditions of probation, the court must discharge the juvenile and dismiss the proceedings without a finding of responsibility for the offense and without entering an order of adjudication. *Id.* "There may be only 1 discharge or dismissal . . . as to an individual." *Id.*

While proceedings are deferred and the juvenile is on probation, the court must maintain a nonpublic record of the case. The Secretary of State must maintain a nonpublic record* of a plea and discharge or dismissal under MCL 436.1703(3). *Id.*

*For permissible uses of this nonpublic record, see MCL 436.1703(3)(a)–(b).

4.8 Restricting Juvenile's Driving Privileges as a Condition of Probation

MCL 712A.2b(e) expressly allows the Family Division to restrict the juvenile's driving privileges as a term or condition of probation. If the court suspends the juvenile's driving privileges or imposes probationary terms and conditions, the court must include the suspension or terms and conditions in the abstract that it sends to the Secretary of State pursuant to MCL 257.732.

4.9 Sending Abstracts to the Secretary of State

"The court shall prepare and forward to the Secretary of State an abstract of its findings at such times and for such offenses as are required by law." MCR 3.943(E)(6). MCL 712A.2b(d) and MCL 257.732 require the clerk of the Family Division to forward an abstract of the court record to the Secretary of State in certain cases following disposition.*

*See Section 5.1 for a detailed description of this requirement.

Abstracts, Expungement of Records, & Setting Aside Adjudications

5

In this chapter. . .

This chapter outlines the requirements for reporting or sending abstracts to the Secretary of State regarding the disposition of cases involving criminal traffic violations. It also sets forth the limits on destroying the court's records of a criminal traffic case and on setting aside an adjudication for a criminal traffic offense.

5.1 Requirements for Sending Abstract of Court Record to Secretary of State

The clerk of the Family Division is required to keep a full record of every case in which a person is charged with or cited for violating the Motor Vehicle Code or a local ordinance substantially corresponding to a provision of the Motor Vehicle Code. MCL 257.732(1). This requirement also applies to offenses pertaining to the operation of ORVs and snowmobiles for which points are assessed under MCL 257.320a(1)(c) and (i). MCL 257.732(1). The county clerk is the clerk of the court for the Family Division and keeps the records and indexes of actions. MCL 600.1007.

The clerk of the court must send an abstract of the court record to the Secretary of State following a finding that the juvenile has committed certain traffic- and alcohol-related offenses.* The abstract must be certified by signature, stamp, or facsimile signature to be true and correct, and it must contain the following information:

*MCL 257.732(16) excludes non-moving violations from the abstracting requirements.

> "(a) The name, address, and date of birth of the person charged or cited.
>
> "(b) The number of the person's operator's or chauffeur's license, if any.
>
> "(c) The date and nature of the violation.
>
> "(d) The type of vehicle driven at the time of the violation.
>
> . . .

> "(e) The date of the conviction, finding, forfeiture, judgment, or civil infraction determination.
>
> "(f) Whether bail was forfeited;
>
> "(g) Any license restriction, suspension, or denial ordered by the court as provided by law.
>
> "(h) The vehicle identification number and registration plate number of all vehicles that are ordered immobilized or forfeited.
>
> "(i) Other information considered necessary to the Secretary of State." MCL 257.732(3)(a)–(i).

The time requirements for sending the required abstract vary according to the type of offense committed by the juvenile.

A. Time Requirements for Violations of the Motor Vehicle Code and Other Criminal Traffic Offenses

*Beginning October 1, 2005, abstracts must be forwarded within five days.

MCL 257.732(1)(a) requires the court, within 14 days* after a conviction, bail forfeiture, civil infraction determination, or default judgment, to forward an abstract of the court record to the Secretary of State if the juvenile is found within the jurisdiction of the Family Division for violating the Motor Vehicle Code or a local ordinance substantially corresponding to a provision of the Motor Vehicle Code.

MCL 257.732(4) requires the clerk to forward an abstract of the court record upon a person's conviction of any of the following offenses or attempt to commit any of the following traffic- and alcohol-related offenses:

- taking possession of and driving away a motor vehicle, MCL 750.413;
- use of a motor vehicle without authority but without intent to steal, MCL 750.414;
- failure to obey a police or conservation officer's direction to stop, MCL 750.479a(2) or (3);
- felonious driving, MCL 752.191;
- negligent homicide with a motor vehicle, MCL 750.324;
- manslaughter with a motor vehicle, MCL 750.321;
- murder with a motor vehicle, MCL 750.316 (first-degree murder) and MCL 750.317 (second-degree murder);
- minor in possession, MCL 436.1703;

- false bomb threat, MCL 750.411a(2);
- fraudulently altering or forging documents pertaining to motor vehicles, MCL 257.257;
- perjury or false certification to Secretary of State, MCL 257.903;
- malicious destruction of trees, grass, shrubs, etc., with a motor vehicle, MCL 750.382(1)(c) or (d);
- failing to stop and disclose identity at the scene of an accident resulting in death or serious injury, MCL 257.617a;
- certain "drunk driving" offenses; and
- a controlled substance violation under MCL 333.7401–333.7461, or 333.17766a, for which the defendant receives a minimum sentence of less than one year.

A "conviction" includes a juvenile disposition for a criminal traffic violation, "regardless of whether the penalty is rebated or suspended." MCL 257.8a(a).*

*See Section 5.2, below, for rules governing the consent calendar.

MCL 257.732(5) requires the clerk to send an abstract to the Secretary of State regarding a juvenile who is subject to deferred proceedings under MCL 436.1703(3):*

*See Section 4.7.

> "Beginning September 1, 2004, the clerk of the court shall also forward an abstract of the court record to the secretary of state if a person has plead guilty to, or admitted responsibility as a juvenile for, a violation of . . . MCL 436.1703, or a local ordinance substantially corresponding to that section, and has had further proceedings deferred under that section. If the person is sentenced to a term of probation and terms and conditions of probation are fulfilled and the court discharges the individual and dismisses the proceedings, the court shall also report the dismissal to the secretary of state."

MCL 257.732(9) states:

> "If the court determines as part of the sentence or disposition that the felony for which the person was convicted or adjudicated and with respect to which notice was given under subsection (7) or (8) is a felony in which a motor vehicle was used,* the clerk of the court shall forward an abstract of the court record of that conviction to the secretary of state."

*See Section 3.7 for a definition of "a felony in which a motor vehicle was used."

B. Time Requirements for "Drunk Driving" Offenses

The clerk must *immediately* forward an abstract of the record for each case charging a violation of MCL 257.625(1), (3), (4), (5), (6), (7), or (8), or a local ordinance substantially corresponding to MCL 257.625(1), (3), (6), or (8), where the charge is dismissed or the juvenile is "acquitted." MCL 257.732(1)(b).

MCL 257.732(1)(c) provides that an abstract must be immediately prepared and forwarded to the Secretary of State for each case charging a violation of the following statutes:

- MCL 324.81134 or 324.81135 (drunk driving—ORV), and
- MCL 324.82127(1) or (3) (OWI or OWVI—snowmobile).

5.2 Family Division Records of Criminal Traffic Violations

MCR 3.925(E) governs the destruction of Family Division files and records. MCR 3.925(E)(1), which sets forth a general rule regarding destruction of those files and records, states as follows:

> "The court may at any time for good cause destroy its own files and records pertaining to an offense by or against a minor, other than an adjudicated offense described in MCL 712A.18e(2), except that the register of actions must not be destroyed. Destruction of a file does not negate, rescind, or set aside an adjudication."*

*See Section 5.3, below, for the requirements to set aside an adjudication.

A "register of actions" is "the permanent case history maintained in accord with the Michigan Supreme Court Case File Management Standards." MCR 3.903(A)(25).

MCR 3.925(E)(2)(c) states that, except for diversion and consent calendar cases, "the court must destroy the files and records pertaining to a person's juvenile offenses, other than any adjudicated offense described in MCL 712A.18e(2), when the person becomes 30 years of age. MCL 712A.18e(2) lists offenses that if committed by an adult would be felonies punishable by life imprisonment and *criminal violations of the Motor Vehicle Code.* A subsection of the Motor Vehicle Code, MCL 257.732(22), adds that "notwithstanding any other provision of law, a court shall not order expunction of any *violation reportable to the secretary of state* under [MCL 257.732]." [Emphasis added.]

Diversion records. MCR 3.925(E)(2)(a) deals with diversion records. Under this rule, the court is required to destroy a juvenile's diversion record within 28 days after the juvenile's 17th birthday.

Consent calendar records. MCR 3.932(C)(7) and MCR 3.925(E)(2)(b) deal with the files and records of cases placed on the consent calendar. MCR 3.932(C)(7) covers cases in which the juvenile successfully completes a consent calendar case plan. That rule states as follows:

> "Upon successful completion by the juvenile of the consent calendar case plan, the court shall close the case and may destroy all records of the proceeding. No report or abstract may be made to any other agency nor may the court require the juvenile to be fingerprinted for a case completed and closed on the consent calendar."

MCR 3.925(E)(2)(b) states that "[t]he court must destroy all files of matters heard on the consent calendar within 28 days after the juvenile becomes 17 years of age or after dismissal from court supervision, whichever is later, unless the juvenile subsequently comes within the jurisdiction of the court on the formal calendar. If a case is transferred to the consent calendar and a register of actions exists, the register of actions must be maintained as a nonpublic record."

In *In re Neubeck,* 223 Mich App 568 (1997), a case decided prior to the May 2003 revision of the consent calendar court rule, the Court of Appeals addressed the interplay between the use of the consent calendar and the expungement of "juvenile court" records in cases involving criminal traffic violations. In *Neubeck,* the juvenile respondent pled guilty to operating a motor vehicle while visibly impaired, MCL 257.625(3), and another offense. Respondent filed a motion requesting that the court place the case on the consent calendar, but the prosecuting attorney objected. The prosecuting attorney argued that cases involving alleged violations of the Motor Vehicle Code could not be placed on the consent calendar because it would conflict with former MCR 5.925(E)(2)(b), which prohibited the expungement of "juvenile court" records of adjudicated criminal traffic offenses. The trial court disagreed. *Neubeck, supra* at 569–70.

On appeal, the Court of Appeals addressed the prosecuting attorney's assertion that the trial court intended to expunge the juvenile respondent's record upon his successful completion of probation or after he turned 18 years of age. Because the prosecuting attorney failed to provide evidence that the trial court actually expunged the respondent's record, the Court of Appeals concluded that the issue was not ripe for review. *Id.* at 573. The Court added:

> "Additionally, petitioner submits to this Court a juvenile consent agreement it alleges that the Oakland County Probate Court uses. The sample agreement provides: 'After a successful Consent probation period, the records may be destroyed after the juvenile's 18th birthday. However, if new charges are found to be true, the Consent records will not be destroyed until the person's 30th birthday.' First, there is no indication that respondent

signed this agreement when he consented to the probate court's jurisdiction, because this agreement does not appear in his file. Second, this agreement does not purport to contradict the terms of MCR 5.925(E)(2)(a) in relation to the general prohibition against expungement of records of juvenile traffic violation adjudications. Third, although petitioner argues that the Oakland County Probate Court has a general policy of expunging records of juvenile traffic violations placed on its consent calendar, there is simply no evidentiary support for this assertion. Even if it were true, it is unfair to require respondent to defend the practice of the probate court where there is no indication that he actually received, or will receive, the benefit of such a policy. If petitioner seeks to challenge the generalized practice of the Oakland County Probate Court, it should bring an action for superintending control against the appropriate parties." *Neubeck, supra* at 573–74.

5.3 Criminal Traffic Adjudications May Not Be Set Aside

MCR 3.925(F)(1) states that "[t]he setting aside of juvenile adjudications is governed by MCL 712A.18e." A person adjudicated of not more than one juvenile offense and who has no felony convictions may file an application with the adjudicating court for entry of an order setting aside the adjudication. A person may have only one adjudication set aside under this section. MCL 712A.18e(1). In criminal proceedings, a person convicted of more than one misdemeanor may not have any offense set aside. *People v Grier,* 239 Mich App 521, 522 (2000). See also *People v McCullough,* 221 Mich App 253 (1997) (the trial court erred by setting aside the defendant's misdemeanor convictions for two offenses arising from the same incident).

MCL 712A.18e(2)(b) provides that a person shall not apply to have set aside, and the court shall not set aside, an adjudication for an offense which if committed by an adult would be a criminal violation of the Motor Vehicle Code. A subsection of the Motor Vehicle Code, MCL 257.732(22), adds that "notwithstanding any other provision of law, a court shall not order expunction of any *violation reportable to the secretary of state* under [MCL 257.732]." [Emphasis added.]

For the offense of unlawfully driving away an automobile or attempted UDAA only, an adjudication must be set aside if the applicant follows all of the procedural requirements of MCL 712A.18e.

In this chapter. . .

The traffic- and alcohol-related offenses covered in this chapter are commonly committed by juveniles. For each offense, we have included the following information:

- the pertinent portions of the statute;
- the elements of the offense;
- the licensing and vehicle sanctions; and
- issues surrounding the offense.

The elements of the offenses are either quoted from CJI2d or gleaned from the statute itself.

6.1 Attempt to Commit a Crime

A. General Attempt Statute

> "Attempt to commit crime—Any person who shall attempt to commit an offense prohibited by law, and in such attempt shall do any act towards the commission of such offense, but shall fail in the perpetration, or shall be

intercepted or prevented in the execution of the same, when no express provision is made by law for the punishment of such attempt, shall be punished as follows:

> "1. If the offense attempted to be committed is such as is punishable with death, the person convicted of such attempt shall be guilty of a felony, punishable by imprisonment in the state prison not more than 10 years;
>
> "2. If the offense so attempted to be committed is punishable by imprisonment in the state prison for life, or for 5 years or more, the person convicted of such attempt shall be guilty of a felony, punishable by imprisonment in the state prison not more than 5 years or in the county jail not more than 1 year;
>
> "3. If the offense so attempted to be committed is punishable by imprisonment in the state prison for a term less than 5 years, or imprisonment in the county jail or by fine, the offender convicted of such attempt shall be guilty of a misdemeanor, punishable by imprisonment in the state prison or reformatory not more than 2 years or in any county jail not more than 1 year or by a fine not to exceed 1,000 dollars; but in no case shall the imprisonment exceed 1/2 of the greatest punishment which might have been inflicted if the offense so attempted had been committed." MCL 750.92.

Attempts to violate any Motor Vehicle Code provision (or any provision from another jurisdiction that substantially corresponds to a Motor Vehicle Code provision) must be treated as completed offenses for purposes of imposing criminal penalties, licensing sanctions, or vehicle sanctions. MCL 257.204b provides:

> "(1) When assessing points, taking licensing or registration actions, or imposing other sanctions under this act for a conviction of an attempted violation of a law of this state, a local ordinance substantially corresponding to a law of this state, or a law of another state substantially corresponding to a law of this state, the secretary of state or the court shall treat the conviction the same as if it were a conviction for the completed offense.
>
> "(2) The court shall impose a criminal penalty for a conviction of an attempted violation of this act or a local ordinance substantially corresponding to a provision of this act in the same manner as if the offense had been completed."

Vehicle Code §204b appears to distinguish between attempted offenses for purposes of imposing licensing or vehicle sanctions and for purposes of imposing criminal penalties.

Licensing and vehicle sanctions—Subsection (1) apparently applies to attempted violations of any Michigan law, local ordinance substantially corresponding to a Michigan law, or substantially corresponding law from another state* for which licensing or vehicle sanctions are imposed under the Vehicle Code. Under subsection (1), any such attempted offense that results in licensing or vehicle sanctions under the Vehicle Code must be treated as a completed offense for purposes of imposing such sanctions, regardless of whether the offense itself constitutes a Vehicle Code violation.

*See Section 1.4(I) for a definition of "substantially corresponding law of another state."

Criminal penalties—Subsection (2) requires courts to treat attempted violations of "this act," i.e., of the Vehicle Code or a substantially corresponding local ordinance, as completed offenses for purposes of imposing criminal penalties. Thus, subsection (2) does not apply to attempted traffic offenses arising outside the Vehicle Code, such as unlawful driving away an automobile under MCL 750.413. Criminal penalties for these offenses must be governed by the general attempt statute, MCL 750.92. See *People v Etchison*, 123 Mich App 448, 452 (1983), and *People v Denmark*, 74 Mich App 402, 416 (1977) (general attempt statute applies only where there is no express provision for attempt in the statute under which the defendant is charged).

It thus appears that for attempted traffic offenses arising outside the Vehicle Code (e.g., unlawful driving away an automobile), licensing sanctions would be governed by Vehicle Code §204b and criminal penalties by the specific statute under which the defendant was convicted or the general attempt statute.

Subsection (2) only applies to penalties for attempted violations of the Vehicle Code; it does not criminalize them. *People v Burton*, 252 Mich App 130, 136 (2002). In *Burton*, defendant challenged his convictions of attempted violations of MCL 257.625 and MCL 257.904 on the grounds that the Vehicle Code did not criminalize attempts. The Court of Appeals agreed, stating that "the Michigan Vehicle Code continues to treat violations of the code ... as if they were completed offenses for purposes of punishment, but it does not specifically proscribe and include attempted violations within the bounds of the code." 252 Mich App 130 at 136. In the absence of a statutory provision specifically criminalizing attempts, attempted violations of the Vehicle Code should be tried under the general attempt statute.

B. Elements

1) Defendant intended to commit a certain crime, which is defined as [state elements from the appropriate instructions defining the crime]; and

2) Defendant took some action toward committing the alleged crime, but failed to complete the crime.

CJI2d 9.1.

"Things like planning the crime or arranging how it will be committed are just preparations; they do not qualify as an attempt. In order to qualify as an attempt, the action must go beyond mere preparation, to the point where the crime would have been completed if it hadn't been interrupted by outside circumstances. To qualify as an attempt, the act must clearly and directly be related to the crime that the defendant is charged with attempting and not some other objective." *Id.*

If factually appropriate, the jury may be instructed that they may find the defendant guilty of attempt even though the evidence convinces them that the crime was completed. *Id.*

C. Licensing Sanctions

Licensing sanctions for a conviction of the attempted offense are listed under each traffic offense.

D. Issues

Application of the general attempt statute is proper only where there is no express provision for attempt in the statute under which defendant is charged. *People v Etchison,* 123 Mich App 448, 452 (1983), and *People v Denmark,* 74 Mich App 402, 416 (1977). If the statute under which an offender is charged makes no provision for attempt, the offender must be charged under the general attempt statute. *People v Burton,* 252 Mich App 130, 134 (2002).

Attempt is a specific intent crime. *People v Langworthy,* 416 Mich 630, 644–45 (1982).

In *Burton, supra,* the defendant was charged with attempted OWI and attempted DWLS. Police officers found defendant asleep behind the wheel of his vehicle. The vehicle's engine was running, but the vehicle was parked in a golf course parking lot with its transmission in "neutral" or "park." Defendant failed a sobriety test and had a blood-alcohol level of 0.17 or 0.18. Defendant admitted to the officers that he had driven across the parking lot. *Id.* at 142–43. The Court of Appeals held that this evidence was insufficient to support a conviction of either charged offense. The Court of Appeals found

that the evidence did not establish that defendant possessed the requisite specific intent to operate his vehicle. The Court looked to the definition of "operate" as set forth in *People v Wood,* 450 Mich 399, 404–05 (1995):

> "Once a person using a motor vehicle as a motor vehicle has put the vehicle in motion, or in a position posing a significant risk of causing a collision, such a person continues to operate it until the vehicle is returned to a position posing no such risk." *Burton, supra* at 143.

The Court in *Burton* concluded that "the evidence did not provide a basis for the jury to properly conclude that defendant's truck was in a position posing a significant risk of causing a collision." *Id.* at 144. In addition, the prosecuting attorney failed to present sufficient evidence that defendant took an action in furtherance of the alleged offenses. *Id.* at 145, 147–48.

Misdemeanors

6.2 Transporting or Possessing Open Alcohol in a Motor Vehicle

A. Statute

> "(1) Except as provided in subsection (2), a person who is an operator or an occupant shall not transport or possess alcoholic liquor in a container that is open or uncapped or upon which the seal is broken within the passenger compartment of a vehicle upon a highway, or within the passenger compartment of a moving vehicle in any place open to the general public or generally accessible to motor vehicles, including an area designated for the parking of vehicles, in this state.
>
> "(2) A person may transport or possess alcoholic liquor in a container that is open or uncapped or upon which the seal is broken within the passenger compartment of a vehicle upon a highway or other place open to the general public or generally accessible to motor vehicles, including an area designated for the parking of vehicles in this state, if the vehicle does not have a trunk or compartment separate from the passenger compartment, the container is enclosed or encased, and the container is not readily accessible to the occupants of the vehicle.
>
> "(3) A person who violates this section is guilty of a misdemeanor. As part of the sentence, the person may be

ordered to perform community service and undergo substance abuse screening and assessment at his or her own expense. . . .

"(4) This section does not apply to a passenger in a chartered vehicle authorized to operate by the state transportation department." MCL 257.624a.

B. Elements

1) Defendant was an operator or occupant of a motor vehicle at the time of the alleged offense;

2) Defendant transported or possessed alcohol in a motor vehicle on a highway; *or*

3) Defendant transported or possessed alcohol in a moving vehicle in any place open to the general public or generally accessible to motor vehicles, including an area designated for parking; and

4) The alcohol was in a container that was open, uncapped, or had a broken seal and was within the passenger compartment of the vehicle.

C. Licensing Sanctions

The Secretary of State will assess two points for a conviction of MCL 257.624a or a substantially corresponding local ordinance. MCL 257.320a(1)(q). Only a driver's conviction is reported to the Secretary of State. MCL 257.732(16)(d).

*If the offender does not have a driver's license, the Secretary of State must deny issuance of a license to the offender.

If the person has one prior conviction for a violation of MCL 257.624a, MCL 257.624b, MCL 436.1703, or former MCL 436.33b(1), the Secretary of State shall suspend the person's driver's license for 90 days.* A restricted license may be issued after the first 30 days of suspension. MCL 257.319(7). If the person has two or more prior convictions of these offenses, a one-year suspension is mandatory. A restricted license may be issued after the first 60 days of suspension. *Id.* A "conviction" includes "a juvenile adjudication, probate court disposition, or juvenile disposition. . . ." MCL 257.8a(a). "Juvenile adjudication" refers to delinquency adjudications in other states. MCL 257.23a(b). "Probate court disposition" and "juvenile disposition" mean a disposition entered under MCL 712A.18. MCL 257.23b and 257.44a.

D. Issues

A person does not violate this statute if he or she transports open intoxicants in the passenger compartment of a motor vehicle that does not have a separate trunk compartment if:

- the open container is enclosed or encased, and
- the open container is not readily accessible to the occupants of the vehicle.

MCL 257.624a(2).

For a violation of minor transporting or possessing alcohol in a motor vehicle under MCL 257.624b, it is not necessary that the intoxicant be opened, uncapped, or unsealed.

For the requirements for ordering substance abuse screening and assessment, see MCL 436.1703(4).

6.3 Minor Possessing or Transporting Alcohol in a Motor Vehicle

A. Statute

> "(1) A person less than 21 years of age shall not knowingly transport or possess alcoholic liquor in a motor vehicle as an operator or occupant unless the person is employed by a licensee under the Michigan liquor control code. . . , a common carrier designated by the liquor control commission . . . , the liquor control commission, or an agent of the liquor control commission and is transporting or having the alcoholic liquor in a motor vehicle under the person's control during regular working hours and in the course of the person's employment. This section does not prevent a person less than 21 years of age from knowingly transporting alcoholic liquor in a motor vehicle if a person at least 21 years of age is present inside the motor vehicle. A person who violates this subsection is guilty of a misdemeanor. As part of the sentence, the person may be ordered to perform community service and undergo substance abuse screening and assessment at his or her own expense . . . ." MCL 257.624b(1).

B. Elements

1) Defendant was an operator or occupant of a motor vehicle at the time of the alleged offense;
2) Defendant was less than 21 years of age;
3) Defendant knowingly transported or possessed alcohol in a motor vehicle;

4) Defendant was not employed by a licensee under the Michigan Liquor Control Code, a common carrier designated by the Liquor Control Commission, the Liquor Control Commission, or an agent of the Liquor Control Commission transporting or having the alcohol in a motor vehicle under the defendant's control during regular working hours and in the course of the defendant's employment; and

5) A person who was at least 21 years of age was not also in the motor vehicle at the time of the alleged offense.

C. Impoundment

Impoundment of the vehicle shall be authorized by court order for a period of not less than 15 days or more than 30 days, "[i]f the court determines upon the hearing of the order to show cause, from competent and relevant evidence, that at the time of the commission of the violation the motor vehicle was being driven by the person less than 21 years of age with the express or implied consent or knowledge of the owner in violation of subsection (1), and that the use of the motor vehicle is not needed by the owner in the direct pursuit of the owner's employment or the actual operation of the owner's business. . . ." MCL 257.624b(3).

To start, a complaint must be filed by the arresting officer or the officer's superior within 30 days after the conviction becomes final requesting that the motor vehicle be impounded. The court shall then issue an order for a hearing to the owner of the motor vehicle to show cause why the motor vehicle should not be impounded. The hearing date in the order shall not be less than ten days after the issuance of the order. The order shall be served by delivering a true copy to the owner, or if the owner cannot be located by sending a true copy by certified mail, not less than three full days before the hearing date. MCL 257.624b(2).

The court order authorizing impoundment allows a law enforcement officer to take possession wherever the motor vehicle is located and to store the vehicle in a public or private garage at the expense and risk of the owner. MCL 257.624b(3).

"A person who knowingly transfers title to a motor vehicle for the purpose of avoiding this section is guilty of a misdemeanor." MCL 257.624b(4).

D. Licensing Sanctions

The Secretary of State will assess two points for a conviction of MCL 257.624b or a substantially corresponding local ordinance. MCL 257.320a(1)(q). Only a driver's conviction is reported to the Secretary of State. MCL 257.732(16)(d).

If the person has one prior conviction for a violation of MCL 257.624a, MCL 257.624b, MCL 436.1703, or former MCL 436.33b(1), the Secretary of State shall suspend the person's driver's license for 90 days.* A restricted license may be issued after the first 30 days of suspension. MCL 257.319(7). If the person has two or more prior convictions of these offenses, a one-year suspension is mandatory. A restricted license may be issued after the first 60 days of suspension. *Id.* A "conviction" includes "a juvenile adjudication, probate court disposition, or juvenile disposition. . . ." MCL 257.8a(a). "Juvenile adjudication" refers to delinquency adjudications in other states. MCL 257.23a(b). "Probate court disposition" and "juvenile disposition" mean a disposition entered under MCL 712A.18. MCL 257.23b and 257.44a.

*If the offender does not have a driver's license, the Secretary of State must deny issuance of a license to the offender.

E. Issues*

*See Section 2.5 for special notice requirements when a minor is charged with a violation of this statute.

It is not necessary that the intoxicant be opened, uncapped, or unsealed, unlike transporting or possessing open alcohol in a motor vehicle under MCL 257.624a.

For the requirements for ordering substance abuse screening and assessment, see MCL 436.1703(4).

6.4 Minor Purchasing, Consuming, or Possessing Alcohol, or Having Any Bodily Alcohol Content

A. Statute*

*The statutory provisions discussed in this section became effective September 1, 2004. See 2004 PA 63.

> "(1) A minor shall not purchase or attempt to purchase alcoholic liquor, consume or attempt to consume alcoholic liquor, possess or attempt to possess alcoholic liquor, or have any bodily alcohol content, except as provided in this section. A minor who violates this subsection is guilty of a misdemeanor punishable by the following fines and sanctions and is not subject to the penalties prescribed in section 909:
>
> > (a) For the first violation a fine of not more than $100.00, and may be ordered to participate in substance abuse prevention services or substance abuse treatment and rehabilitation services as defined in section 6107 of the public health code, 1978 PA 368, MCL 333.6107, and designated by the administrator of substance abuse services, and may be ordered to perform community service and to undergo substance abuse screening and assessment at his or her own expense as described in subsection (4).
> >
> > (b) For a violation of this subsection following a prior conviction or juvenile adjudication for a

violation of this subsection, section 33b(1) of former 1933 (Ex Sess) PA 8, or a local ordinance substantially corresponding to this subsection or section 33b(1) of former 1933 (Ex Sess) PA 8, by imprisonment for not more than 30 days but only if the minor has been found by the court to have violated an order of probation, failed to successfully complete any treatment, screening, or community service ordered by the court, or failed to pay any fine for that conviction or juvenile adjudication, a fine of not more than $200.00, or both, and may be ordered to participate in substance abuse prevention services or substance abuse treatment and rehabilitation services as defined in section 6107 of the public health code, 1978 PA 368, MCL 333.6107, and designated by the administrator of substance abuse services, to perform community service, and to undergo substance abuse screening and assessment at his or her own expense as described in subsection (4).

(c) For a violation of this subsection following 2 or more prior convictions or juvenile adjudications for a violation of this subsection, section 33b(1) of former 1933 (Ex Sess) PA 8, or a local ordinance substantially corresponding to this subsection or section 33b(1) of former 1933 (Ex Sess) PA 8, by imprisonment for not more than 60 days but only if the minor has been found by the court to have violated an order of probation, failed to successfully complete any treatment, screening, or community service ordered by the court, or failed to pay any fine for that conviction or juvenile adjudication, a fine of not more than $500.00, or both, and may be ordered to participate in substance abuse prevention services or substance abuse treatment and rehabilitation services as defined in section 6107 of the public health code, 1978 PA 368, MCL 333.6107, and designated by the administrator of substance abuse services, to perform community service, and to undergo substance abuse screening and assessment at his or her own expense as described in subsection (4).

"(2) A person who furnishes fraudulent identification to a minor, or notwithstanding subsection (1) a minor who uses fraudulent identification to purchase alcoholic liquor, is guilty of a misdemeanor punishable by imprisonment for not more than 93 days or a fine of not more than $100.00, or both." MCL 436.1703(1)–(2).

B. Elements

If the defendant is charged with purchasing, consuming, or possessing alcoholic liquor, the elements are:

1) Defendant was less than 21 years of age;

2) Defendant purchased or attempted to purchase, consumed or attempted to consume, or possessed or attempted to possess alcoholic liquor;

3) Defendant did not possess the alcoholic liquor for his or her personal consumption during regular working hours in the course of his or her employment by a person licensed under the Liquor Control Code, an agent of the Liquor Control Commission, or the commission itself;* and

4) Defendant did not consume the alcoholic liquor in connection with a religious service.

*MCL 436.1703(8). There are also exceptions contained in subsections (10) and (12) of the statute.

If the defendant is charged with having any bodily alcohol content, the elements are:

1) Defendant was less than 21 years of age, and

2) Defendant had either of the following:

   - an alcohol content of 0.02 grams or more per 100 milliliters of blood, per 210 liters of breath, or per 67 milliliters of urine, or

   - any presence of alcohol within his or her body resulting from the consumption of alcoholic liquor, other than consumption of alcoholic liquor as a part of a generally recognized religious service or ceremony.

C. Licensing Sanctions

No points. The conviction is reported to the Secretary of State. MCL 257.732(4)(d).

For violations of MCL 436.1703(1), if the person has one prior conviction for a violation of MCL 257.624a, MCL 257.624b, MCL 436.1703, or former MCL 436.33b(1), the Secretary of State shall suspend the person's driver's license for 90 days.* A restricted license may be issued after the first 30 days of suspension. MCL 436.1703(5) and MCL 257.319(7)(a). If the person has two or more prior convictions of these offenses, a one-year suspension is mandatory. A restricted license may be issued after the first 60 days of suspension. MCL 257.319(7)(b). A "conviction" includes "a juvenile adjudication, probate court disposition, or juvenile disposition. . . ." MCL 257.8a(a). "Juvenile adjudication" refers to delinquency adjudications in

*If the offender does not have a driver's license, the Secretary of State must deny issuance of a license to the offender.

other states. MCL 257.23a(b). "Probate court disposition" and "juvenile disposition" mean a disposition entered under MCL 712A.18. MCL 257.23b and 257.44a.

For a violation of MCL 436.1703(2), or a substantially corresponding local ordinance, the Secretary of State must suspend the person's driver's license for 90 days. MCL 257.319(3)(d).

D. Issues*

*See Section 2.5 for special notice requirements when a minor is charged with a violation of this statute.

A peace officer may administer a "preliminary chemical breath analysis" or "PBT" to a minor suspected of violating MCL 436.1703, and the minor's refusal to submit to a PBT constitutes a state civil infraction. MCL 436.1703(6) states as follows:

> "(6) A peace officer who has reasonable cause to believe a minor has consumed alcoholic liquor or has any bodily alcohol content may require the person to submit to a preliminary chemical breath analysis. A peace officer may arrest a person based in whole or in part upon the results of a preliminary chemical breath analysis. The results of a preliminary chemical breath analysis or other acceptable blood alcohol test are admissible in a criminal prosecution to determine whether the minor has consumed or possessed alcoholic liquor or had any bodily alcohol content. A minor who refuses to submit to a preliminary chemical breath test analysis as required in this subsection is responsible for a state civil infraction and may be ordered to pay a civil fine of not more than $100.00."

"Any bodily alcohol content" means either of the following:

> "(a) An alcohol content of 0.02 grams or more per 100 milliliters of blood, per 210 liters of breath, or per 67 milliliters of urine.
>
> "(b) Any presence of alcohol within a person's body resulting from the consumption of alcoholic liquor, other than consumption of alcoholic liquor as a part of a generally recognized religious service or ceremony." MCL 436.1703(15)(a)–(b).

In *People v Rutledge,* 250 Mich App 1 (2002), a 19-year-old man was charged with violating MCL 436.1703(1) by consuming or possessing alcoholic liquor. The defendant consumed alcoholic liquor legally in Canada but not in Michigan. The district and circuit courts ruled that defendant illegally consumed or possessed alcoholic liquor in Michigan by having it in his body within this state. *Rutledge, supra* at 2–3. The Court of Appeals disagreed. After noting that a state has jurisdiction over offenses committed in whole or

in part within that state, the Court of Appeals concluded that the terms "consume" and "possess" as used in the "minor in possession" statute are ambiguous. *Id.* at 3–6. The Court concluded that the commonly accepted meanings of these terms excluded digestion of alcoholic beverages. Thus, after ingesting alcoholic liquor, a person no longer possesses or consumes it. *Id.* at 8. The Court also stated as follows:

> "We conclude that minors who legally ingest alcohol in a jurisdiction outside Michigan and then return to Michigan (e.g., as passengers in a vehicle) with the alcohol in their bodies have not violated the minor in possession statute. If the Legislature intended to criminalize this conduct, it could easily have done so or can amend the statute to include it." *Id.* at 11.

The Legislature did amend the statute to criminalize a minor "having any bodily alcohol content." 2004 PA 63. Although this legislation was introduced in part in response to the *Rutledge* case, 2004 PA 63 included a provision that allows a juvenile or criminal defendant to assert as an affirmative defense that he or she legally consumed the alcohol in his or her body. MCL 436.1703(14) states as follows:

> "In a criminal prosecution for the violation of subsection (1) concerning a minor having any bodily alcohol content, it is an affirmative defense that the minor consumed the alcoholic liquor in a venue or location where that consumption is legal."

2003 PA 61 changed the terminology in the Liquor Control Code from "intoxicating liquor" to "alcoholic liquor." "Alcoholic liquor" is defined as "any spirituous, vinous, malt, or fermented liquor, liquids and compounds, whether or not medicated, proprietary, patented, and by whatever name called, containing 1/2 of 1% or more of alcohol by volume which are fit for use for beverage purposes as defined and classified by the commission according to alcoholic content as belonging to 1 of the varieties defined in [the Michigan Liquor Control Code of 1998]." MCL 257.1d and MCL 436.1105(2).

For the requirements for ordering substance abuse screening and assessment, see MCL 436.1703(4).

6.5 Unlawful Use of an Automobile, Without Intent to Steal

A. Statute

> "Any person who takes or uses without authority any motor vehicle without intent to steal the same, or who is a party to such unauthorized taking or using, is guilty of a

misdemeanor punishable by imprisonment for not more than 2 years or a fine of not more than $1,500.00. However, in case of a first offense, the court may reduce the punishment to imprisonment for not more than 3 months or a fine of not more than $500.00. However, this section does not apply to any person or persons employed by the owner of said motor vehicle or anyone else, who, by the nature of his or her employment, has the charge of or the authority to drive said motor vehicle if said motor vehicle is driven or used without the owner's knowledge or consent." MCL 750.414.

B. Elements

CJI2d 24.2 states:

"(2) First, that the vehicle belonged to someone else.

"(3) Second, that the defendant used the vehicle.

"(4) Third, that the defendant did this without authority.

"(5) Fourth, that the defendant intended to use the vehicle, knowing that [he / she] did not have authority to do so.

"[(6) Anyone who assists in using a vehicle is also guilty of this crime if (he / she) gave the assistance knowing that the person who was taking or using it did not have the authority to do so.]"

C. Licensing Sanctions

Two points. The conviction is reported to the Secretary of State. MCL 257.732(4)(a). The Secretary of State has interpreted "[a]ll other moving violations to include this offense. MCL 257.320a(1)(s). A conviction for the attempted offense receives the same number of points. MCL 257.204b(1).

If the defendant has no prior convictions for this offense within the preceding seven years, the Secretary of State must suspend the defendant's driver's license for 90 days. If the defendant has one or more convictions for the offense within seven years, the Secretary of State must suspend the defendant's driver's license for one year. MCL 257.319(6)(a)–(b). A "conviction" includes "a juvenile adjudication, probate court disposition, or juvenile disposition. . . ." MCL 257.8a(a). "Juvenile adjudication" refers to delinquency adjudications in other states. MCL 257.23a(b). "Probate court disposition" and "juvenile disposition" mean a disposition entered under MCL 712A.18. MCL 257.23b and 257.44a.

Upon posting of an abstract that an individual has been found guilty of unlawful use of an automobile, the Secretary of State shall assess a $1,000.00 driver responsibility fee for two consecutive years. MCL 257.732a(2)(a)(*i*).

D. Issues

To be convicted of unlawful use of an automobile, the defendant must have intended to use the vehicle, knowing that he or she had no authority to do so; no intent is required beyond the intent to do the physical act itself. This offense is a general intent crime. Voluntary intoxication is not available as a defense. *People v Laur*, 128 Mich App 453, 455 (1983).

The phrase "without authority" has been interpreted by the courts to mean "beyond the authority" or "in excess of [the] authority" granted to the person using the automobile. *People v Hayward*, 127 Mich App 50, 61 (1983), and *Landon v Titan Ins Co*, 251 Mich App 633, 643 (2002).

Unlawful use of an automobile under §414 is a necessarily lesser-included offense of unlawfully driving away an automobile under §413. *People v Crosby*, 82 Mich App 1, 3 (1978).

"Joyriding" is a term sometimes used to describe this offense. *Priesman v Meridian Mut Ins Co*, 441 Mich 60, 70 (1992) (Griffin, J, dissenting). However, the primary use of "joyriding" is to describe the felony offense. See *People v Lerma*, 66 Mich App 566, 570 (1976), and *People v Hayward, supra* at 63, referring to the felony provisions of MCL 750.413 as "the 'joyriding' statute" and "a felony commonly known as 'joyriding.'"

Unlawful driving away an automobile is a related felony under MCL 750.413.* The Court of Appeals has distinguished unlawful driving away an automobile from unlawful use of an automobile without intent to steal as follows:

*See Section 6.7, below, for more information on unlawful driving away an automobile.

> "The distinction between the two offenses is that [the felony offense] requires the defendant to take possession of the motor vehicle without the owner's permission, while the misdemeanor offense of unlawful use of a motor vehicle is committed when an individual, who has been given lawful possession of a motor vehicle, uses it beyond the authority which has been granted to him by the owner." *Hayward, supra* at 61 (1983). See also CJI2d 24.4.

Note: Although the *Hayward* court lists lawful possession as one of the elements of unlawful use of an automobile, that element is not found in the statute, and the *Crosby* court specifically notes that "[l]awful possession is not an element of the offense of unlawful use of an automobile." *Crosby, supra* at 4.

6.6 Driving While License Suspended or Revoked

A. Statute

> "(1) A person whose operator's or chauffeur's license or registration certificate has been suspended or revoked and who has been notified as provided in section 212 of that suspension or revocation, whose application for license has been denied, or who has never applied for a license, shall not operate a motor vehicle upon a highway or other place open to the general public or generally accessible to motor vehicles, including an area designated for the parking of motor vehicles, within this state.
>
> * * *
>
> "(3) Except as otherwise provided in this section, a person who violates subsection (1) . . . is guilty of a misdemeanor punishable as follows:
>
> > (a) For a first violation, by imprisonment for not more than 93 days or a fine of not more than $500.00, or both. . . .
> >
> > (b) For a violation that occurs after a prior conviction, by imprisonment for not more than 1 year or a fine of not more than $1,000.00, or both. . . ." MCL 257.904(1), (3).

B. Elements

1) The defendant was subject to one of the following restrictions:
   - The defendant's operator's or chauffeur's license or registration certificate was suspended or revoked, and the defendant had been notified of this in accordance with MCL 257.212, or
   - The defendant's application for a license was denied, or
   - The defendant never applied for a license, and
2) The defendant operated a motor vehicle on a Michigan highway or other place open to the general public or generally accessible to motor vehicles, including an area designated for parking.

C. Licensing and Vehicle Sanctions

Licensing sanctions. A person who violates §904(1) is subject to the following licensing sanctions,* regardless of whether the violation is a first-time or repeat offense:

*If the offender does not have a driver's license, the Secretary of State must deny issuance of a license to the offender.

- If the violation occurs during a suspension of definite length or if the violation occurs before the person is approved for a license following revocation, the Secretary of State shall immediately impose an additional like period of suspension or revocation. MCL 257.904(10).
- If the violation occurs while the license is indefinitely suspended or after denial of an application for a license, the Secretary of State shall immediately impose a 30-day suspension or denial. MCL 257.904(11).

If the Secretary of State receives records of more than one conviction or civil infraction determination resulting from the same incident, all of the convictions or civil infraction determinations shall be treated as a single violation for purposes of imposing an additional period of suspension or revocation under the foregoing provisions. MCL 257.904(13).

Periods of suspension or revocation imposed under MCL 257.904(10) or (11) do not apply to persons who have only one currently effective suspension or denial on their driving records under §321a* and were convicted of or received a civil infraction determination for a violation that occurred during that suspension or denial. This exemption may only be applied once during a person's lifetime. MCL 257.904(18).

*MCL 257.321a concerns failures to answer a citation or notice to appear in court and failures to comply with an order or judgment. See Section 3.12.

Driver responsibility fee. The Secretary of State will assess a $500.00 driver responsibility fee each year for two consecutive years. MCL 257.732a(2)(b)(*iii*).

Vehicle sanctions; immobilization. The Motor Vehicle Code makes no provision for immobilization or forfeiture for first-time violations under §904(1). See MCL 257.904(17). However, first offenders may be subject to vehicle impoundment for up to 120 days from the date of judgment under MCL 257.904b(2).

Offenders with a second or subsequent suspension or revocation under §904 within seven years receive the following sanctions:

- Second suspension, revocation, or denial within seven years: immobilization for a maximum of 180 days, in the court's discretion. MCL 257.904d(2)(a). The court may also order impoundment for up to 120 days from the date of judgment under MCL 257.904b(1).

- Third or fourth suspension, revocation, or denial within seven years: mandatory immobilization for 90 to 180 days. MCL 257.904d(2)(c).

- Fifth (or subsequent) suspension, revocation, or denial within seven years: mandatory immobilization for no less than one and no more than three years. MCL 257.904d(2)(d).

Registration denial. In addition to the foregoing vehicle sanctions, offenders who have a fourth or subsequent suspension or revocation are subject to mandatory vehicle registration denial under MCL 257.219(1)(d).

Cancellation of registration plates. Upon receiving notice from the police of a §904(1) violation, the Secretary of State shall cancel the vehicle registration plates. MCL 257.904(3). This sanction is subject to the following exceptions:

- For a first violation, the vehicle was stolen or used with the permission of a person who did not knowingly permit an unlicensed driver to operate the vehicle.

- For a violation occurring after a prior conviction, the vehicle was stolen.

D. Issues

For purposes of §904, a person who never applied for a license includes a person who applied for a license, was denied, and never applied again. MCL 257.904(19).

Felonies

6.7 Unlawful Driving Away An Automobile

A. Statute

> "Any person who shall, wilfully and without authority, take possession of and drive or take away, and any person who shall assist in or be a party to such taking possession, driving or taking away of any motor vehicle, belonging to another, shall be guilty of a felony, punishable by imprisonment in the state prison for not more than 5 years." MCL 750.413.

B. Elements

"(2) First, that the vehicle belonged to someone else.

"(3) Second, that the defendant took possession of the vehicle and [drove / took] it away.

"(4) Third, that these acts were both done [without authority / without the owner's permission].

"(5) Fourth, that the defendant intended to take possession of the vehicle and [drive / take] it away. It does not matter whether the defendant intended to keep the vehicle." CJI2d 24.1(2)–(5).

C. Licensing Sanctions

Six points. The conviction is reported to the Secretary of State. MCL 257.320a(1)(a) and MCL 257.732(4)(a). A conviction of attempted UDAA receives the same number of points. MCL 257.204b(1).

Suspension of defendant's license is mandatory under statute for a period of one year. MCL 257.319(2)(b). A conviction for the attempted offense receives the same suspension. MCL 257.204b(1).

Revocation of defendant's license by the Secretary of State occurs when defendant has two or more convictions of a "felony in which a motor vehicle was used" within seven years. MCL 257.303(5)(b)(*i*). A "conviction" includes "a juvenile adjudication, probate court disposition, or juvenile disposition. . . ." MCL 257.8a(a). "Juvenile adjudication" refers to delinquency adjudications in other states. MCL 257.23a(b). "Probate court disposition" and "juvenile disposition" mean a disposition entered under MCL 712A.18. MCL 257.23b and 257.44a.

Upon posting of an abstract that an individual has been found guilty of this offense, the Secretary of State shall assess a $1,000.00 driver responsibility fee for two consecutive years. MCL 257.732a(2)(a)(*i*).

D. Issues*

*See also Section 5.3 (setting aside adjudications of UDAA).

"[A]ny person who shall assist in or be a party to such" a crime shall also be guilty of a felony. MCL 750.413. See also CJI2d 24.1(6).

"[A] specific intent to take possession unlawfully of the vehicle is a necessary ingredient of the [felony offense]....The intent to do only the required physical act...the taking or driving away of the motor vehicle without authority...would therefore be insufficient." *People v Lerma*, 66 Mich App 566, 570, 571 (1976).

"[U]nlawful driving away an automobile does not require proof of an intent to permanently deprive the owner of his property and is therefore not larceny...In cases involving the taking of an automobile, the prosecution will often charge unlawfully driving away a motor vehicle in lieu of larceny so as to dispense

with the need to prove 'intent to steal.'" *People v Goodchild*, 68 Mich App 226, 233 (1976).

The issue of whether a vehicle is a "motor vehicle" is a question of law to be decided by the court. *People v Shipp*, 68 Mich App 452, 454–55 (1976) (a motorcycle found to be a "motor vehicle"). See MCL 750.412 (definition of "motor vehicle").

A person who has possession of an automobile as a bailee cannot violate §413 because that person already has lawful possession. *Landon v Titan Ins Co,* 251 Mich App 633, 641 (2002). In *Landon*, plaintiff was held to be a bailee of an automobile when the owner of the automobile, in an attempt to sell it, left it for display in plaintiff's yard with the keys in it, with the understanding that plaintiff would give the keys to potential buyers to take test drives. Plaintiff's later use of the automobile, even if unauthorized, did not violate §413. *Landon*, *supra* at 641-43.

This offense is sometimes called "UDAA" and is sometimes called "joyriding." *Mester v State Farm Mutual Ins Co*, 235 Mich App 84, 88 (1999), and *People v Hayward*, 127 Mich App 50, 63 (1983). However, the latter term is problematic because the misdemeanor offense described in MCL 750.414 is also sometimes referred to as "joyriding." *Priesman v Meridian Mut Ins Co*, 441 Mich 60, 70 (1992) (Griffin, J, dissenting).

*See Section 6.5, above.

Unlawful use of an automobile without intent to steal is a two-year misdemeanor under MCL 750.414.* The Court of Appeals has distinguished unlawful driving away an automobile from unlawful use of an automobile without intent to steal as follows:

> "The distinction between the two offenses is that [the felony offense] requires the defendant to take possession of the motor vehicle without the owner's permission, while the [two-year] misdemeanor offense of unlawful use of a motor vehicle is committed when an individual, who has been given lawful possession of a motor vehicle, uses it beyond the authority which has been granted to him by the owner." *Hayward, supra* at 61. See also CJI2d 24.4.

Note: Although the *Hayward* court lists lawful possession as one of the elements of unlawful use of an automobile, that element is not found in the statute, and the *Crosby* court specifically notes that "[l]awful possession is not an element of the offense of unlawful use of an automobile." *Crosby, supra* at 4.

Unlawful use of an automobile, MCL 750.414, is a necessarily lesser-included offense of unlawfully driving away an automobile. *People v Crosby*, 82 Mich App 1, 3 (1978).

6.8 Failing to Stop at Signal of Police Officer ("Fleeing and Eluding")

A substantially similar statute appears in both the Motor Vehicle Code and the Michigan Penal Code. MCL 257.602a and MCL 750.479a. Differences in the two statutes are noted below.

Note that the Motor Vehicle Code statute applies only to the operation of vehicles on the highways. MCL 257.601 (provisions of the Motor Vehicle Code apply "exclusively to the operation of vehicles on the highways except where a different place is specifically referred to. . .").

A. Statutes

Subsections (1)–(5) of both statutes are substantially similar. MCL 257.602a states as follows:

> "(1) A driver of a motor vehicle who is given by hand, voice, emergency light, or siren a visual or audible signal by a police or conservation officer, acting in the lawful performance of his or her duty, directing the driver to bring his or her motor vehicle to a stop shall not willfully fail to obey that direction by increasing the speed of the motor vehicle, extinguishing the lights of the motor vehicle, or otherwise attempting to flee or elude the officer. This subsection does not apply unless the police or conservation officer giving the signal is in uniform and the officer's vehicle is identified as an official police or department of natural resources vehicle."
>
> "(2) Except as provided in subsection (3), (4), or (5), an individual who violates subsection (1) is guilty of fourth-degree fleeing and eluding, a felony punishable by imprisonment for not more than 2 years or a fine of not more than $500.00,* or both.
>
> "(3) Except as provided in subsection (4) or (5), an individual who violates subsection (1) is guilty of third-degree fleeing and eluding, a felony punishable by imprisonment for not more than 5 years or a fine of not more than $1,000.00,* or both, if 1 or more of the following circumstances apply:
>
> (a) The violation results in a collision or accident.
>
> (b) A portion of the violation occurred in an area where the speed limit is 35 miles an hour or less, whether that speed limit is posted or imposed as a matter of law.

*MCL 750.479a(2) provides for a fine of not more than $2000.00.

*MCL 750.479a(3) provides for a fine of not more than $5000.00.

(c) The individual has a prior conviction for fourth-degree fleeing and eluding, attempted fourth-degree fleeing and eluding, or fleeing and eluding under a current or former law of this state prohibiting substantially similar conduct.

"(4) Except as provided in subsection (5), an individual who violates subsection (1) is guilty of second-degree fleeing and eluding, a felony punishable by imprisonment for not more than 10 years or a fine of not more than $5,000.00,* or both, if 1 or more of the following circumstances apply:

*MCL 750.479a(4) provides for a fine of not more than $10,000.00.

(a) The violation results in serious injury* to an individual.

*MCL 750.479a(4)(a) requires the violation to result in "serious impairment of a body function." See below for definition of this term.

(b) The individual has 1 or more prior convictions for first-, second-, or third-degree fleeing and eluding, attempted first-, second-, or third-degree fleeing and eluding, or fleeing and eluding under a current or former law of this state prohibiting substantially similar conduct.

(c) The individual has any combination of 2 or more prior convictions for fourth-degree fleeing and eluding, attempted fourth-degree fleeing and eluding, or fleeing and eluding under a current or former law of this state prohibiting substantially similar conduct.

"(5) If the violation results in the death of another individual, an individual who violates subsection (1) is guilty of first-degree fleeing and eluding, a felony punishable by imprisonment for not more than 15 years or a fine of not more than $10,000.00,* or both." MCL 257.602a(1)–(5) and MCL 750.479a(1)–(5).

*MCL 750.479a(5) provides for a fine of not more than $15,000.00.

MCL 257.602a(7) defines "serious injury" in the following manner:

"As used in this section, 'serious injury' means a physical injury that is not necessarily permanent, but that constitutes serious bodily disfigurement or that seriously impairs the functioning of a body organ or limb. Serious injury includes, but is not limited to, 1 or more of the following:

(a) Loss of a limb or use of a limb.

(b) Loss of a hand, foot, finger, or thumb or use of a hand, foot, finger, or thumb.

(c) Loss of an eye or ear or use of an eye or ear.

(d) Loss or substantial impairment of a bodily function.

(e) Serious visible disfigurement.

(f) A comatose state that lasts for more than 3 days.

(g) Measurable brain damage or mental impairment.

(h) A skull fracture or other serious bone fracture.

(i) Subdural hemorrhage or hematoma."

The definition of "serious impairment of a body function" for purposes of MCL 750.479a(4) is contained in MCL 257.58c of the Motor Vehicle Code. MCL 750.479a(9). That statute's definition of "serious impairment of body function" is similar to the non-exclusive list of injuries quoted above, except that "substantial impairment of a body function" also includes loss of an organ. MCL 257.8c(j).*

*See also Section 4.5(A) for further discussion of the term "substantial impairment of a body function."

B. Elements

The elements of **fourth-degree fleeing and eluding** are:

1) The officer was in uniform and performing his or her lawful duties [and any vehicle vehicle driven by the officer was adequately marked as a law enforcement vehicle];

2) The defendant was driving a motor vehicle;

3) The police officer ordered the defendant to stop the vehicle;

4) The defendant knew of the order; and

5) The defendant refused to obey the order by trying to flee or avoid being caught.*

*This element of CJI2d 13.6c (third-degree fleeing and eluding) was upheld in *People v Grayer,* 252 Mich App 349, 355 (2002).

CJI2d 13.6d.

The elements of **third-degree fleeing and eluding** are:

1) The elements of fourth-degree fleeing and eluding, and one of the following:

   - the violation resulted in a collision or accident, or

   - any portion of the violation occurred in an area where the speed limit was 35 miles per hour or less. The speed limit may be posted or imposed as a matter of law, or

- the defendant has been previously convicted of fourth-degree fleeing and eluding, attempted fourth-degree fleeing and eluding, or fleeing and eluding under a current or former Michigan law prohibiting substantially similar conduct.

CJI2d 13.6c.

The elements of **second-degree fleeing and eluding** are:

1) The elements of fourth-degree fleeing and eluding, and one of the following:

   - the violation resulted in serious injury [serious impairment of a body function] to an individual, or

   - the defendant has one or more previous convictions for first-, second-, or third-degree fleeing and eluding, attempted first-, second-, or third-degree fleeing and eluding, or fleeing and eluding under a current or former Michigan law prohibiting substantially similar conduct, or

   - the defendant has two or more previous convictions of any combination of the following offenses: fourth-degree fleeing and eluding, attempted fourth-degree fleeing and eluding, or fleeing and eluding under a current or former Michigan law prohibiting substantially similar conduct.

CJI2d 13.6b

The elements of **first-degree fleeing and eluding** are:

1) The elements of fourth-degree fleeing and eluding, and

2) The violation resulted in the death of another person.

CJI2d 13.6a.

C. Licensing Sanctions

Six points. The conviction is reported to the Secretary of State. MCL 257.320a(1)(f). A conviction of the attempted offense receives the same number of points. MCL 257.204b(1). The Secretary of State will assess a $1000.00 driver responsibility fee each year for two consecutive years. MCL 257.732a(2)(a)(*v*).

Following convictions of fourth- or third-degree fleeing and eluding, suspension of defendant's license is mandatory under statute for a period of one year. MCL 257.319(2)(e) and MCL 750.479a(6). A conviction of the attempted offense receives the same suspension. MCL 257.204b(1).

Following convictions of second- or first-degree fleeing and eluding, the Secretary of State shall revoke the defendant's driver's license. MCL 257.303(5)(d) and (f) and MCL 750.479a(7). For repeat-offender provisions, see MCL 257.303(5)(b)(*ii*) and (*iv*).

D. Issues

Whether sufficient evidence exists to bind over a defendant for fleeing and eluding depends on "the type of signal given and the context in which it occurs[.]" *People v Green*, 260 Mich App 710, 718 (2004). In *Green*, the defendant moved to quash the information against him for fleeing and eluding on the grounds that the police officer and the police vehicle failed to satisfy the statutory requirement that both the vehicle and the officer be "plainly or clearly marked" at the time of the incident. The trial court granted the defendant's motion because the police officer who ordered the defendant to stop "was not in or near his police vehicle at the time defendant left the area." *Id.* at 713.

The Court of Appeals reversed the trial court's ruling and explained that the plain language of the fleeing and eluding statute requires a driver to stop when given a visual or audible signal by a police officer. The officer's signal may be given by hand, voice, emergency light, or siren, but the Court emphasized that MCL 750.479a "does not require that this signal to the driver of a motor vehicle be given *from within* the officer's officially identified police vehicle." *Green, supra* at 717 [emphasis in original]. The Court further explained that the "fair and natural import" of the statutory language indicates that if the signal to stop is given by an officer away from that officer's vehicle, the statute requires that the officer be in uniform. *Id.* at 718. Similarly, "if the signal occurs by emergency light or siren, that signal must come from an officially identified police vehicle in order to hold a driver accountable for the offense of fleeing and eluding." *Id.*

Neither statute is limited to prohibiting only high-speed or long-distance "police chases." The Court of Appeals found sufficient evidence to bind over the defendant for trial where, after the police officer signalled for defendant to stop, defendant sped up slightly, made two turns, stopped the car, and attempted to flee on foot. A defendant's intent to flee or elude a police officer may be inferred from his or her acceleration, turning off the vehicle's headlights, or other similar actions after the officer signals the defendant to stop. *People v Grayer,* 235 Mich App 737, 741–42 (1999). See also *People v Grayer,* 252 Mich App 349, 355–56 (2002) (the evidence in this case was sufficient to support defendant's conviction).

Fleeing and eluding is not a specific-intent crime; therefore, a defendant cannot raise voluntary intoxication as a defense to a charge of fleeing and eluding. *People v Abramski*, 257 Mich App 71, 73 (2003). In *Abramski*, the defendant was convicted by jury of four charges, including fleeing and eluding and operating a motor vehicle while under the influence. The defendant argued that the statutory language prohibiting the conduct of

fleeing and eluding expressly requires that a driver *willfully* fail to obey a police officer's direction. According to the defendant, the inclusion of the word "willfully" in the statutory language indicated that more than general intent was required to constitute a violation. The Court of Appeals disagreed and reasoned that "'[w]here the knowledge element of an offense is necessary simply to prevent innocent acts from constituting crimes,'" the "knowledge" or "willful" element of the statute is only a general intent requirement. *Id.,* quoting *People v Karst*, 138 Mich App 413, 416 (1984).

Having concluded that the fleeing and eluding statute does not require that an individual intend that his or her conduct cause or result in a specific consequence beyond fleeing and eluding, the defendant could not raise voluntary intoxication as a defense. "[V]oluntary intoxication is not a defense to a general-intent crime." *Abramski, supra* at 73.

A passenger may be convicted of fleeing and eluding under an aiding and abetting theory. *People v Branch,* 202 Mich App 550, 551–52 (1993). In *Branch,* during a high-speed chase, defendant threw full beer cans at a police car giving chase and instructed the driver. The Court of Appeals held that the aiding and abetting statute, MCL 767.39, may be applied to passengers, and that the jury was properly instructed that a defendant must have intentionally assisted the driver to commit fleeing and eluding. *Branch, supra.*

A "conviction" includes "a juvenile adjudication, probate court disposition, or juvenile disposition. . . ." MCL 257.8a(a). "Juvenile adjudication" refers to delinquency adjudications in other states. MCL 257.23a(b). "Probate court disposition" and "juvenile disposition" mean a disposition entered under MCL 712A.18. MCL 257.23b and 257.44a.

A person may be convicted under either MCL 257.602a(2)–(5) or MCL 750.479a(2)–(5) but not both, for conduct arising out of the same transaction. MCL 257.602a(6) and MCL 750.479a(8). A person may be charged with and convicted of MCL 257.602a(5) or MCL 750.479a(5) for each death arising out of the same criminal transaction, and a court may impose consecutive sentences upon conviction. MCL 769.36(1)(a) and (b).

Disobeying the direction of a police officer is a misdemeanor; the sanctions for this offense do not include license suspension. MCL 257.602.

"Drunk Driving" Offenses

6.9 Section 625(1) and (8) Offenses—OWI

This section addresses four of the "drunk driving" offenses contained in MCL 257.625. The offenses all involve operating a motor vehicle while under the influence of alcoholic liquor, a controlled substance, or both, or with an

unlawful bodily alcohol level or the presence of a controlled substance in the body. The four offenses are:

- Operating a motor vehicle while under the influence of alcoholic liquor.
- Operating a motor vehicle while under the influence of a controlled substance.
- Operating a motor vehicle with an unlawful bodily alcohol level.
- Operating a motor vehicle with the presence of controlled substance.

All four offenses are subject to the same penalties.

A. Statute

> "(1) A person, whether licensed or not, shall not operate a vehicle upon a highway or other place open to the general public or generally accessible to motor vehicles, including an area designated for the parking of vehicles, within this state if the person is operating while intoxicated. As used in this section, 'operating while intoxicated' means either of the following applies:
>
> > (a) The person is under the influence of alcoholic liquor, a controlled substance, or a combination of alcoholic liquor and a controlled substance.
> >
> > (b) The person has an alcohol content of 0.08 grams or more per 100 milliliters of blood, per 210 liters of breath, or per 67 milliliters of urine, or, beginning October 1, 2013, the person has an alcohol content of 0.10 grams or more per 100 milliliters of blood, per 210 liters of breath, or per 67 milliliters of urine.
>
> * * *
>
> "(8) A person, whether licensed or not, shall not operate a vehicle upon a highway or other place open to the general public or generally accessible to motor vehicles, including an area designated for the parking of vehicles, within this state if the person has in his or her body any amount of a controlled substance listed in schedule 1 under . . . MCL 333.7212, or a rule promulgated under that section, or of a controlled substance described in . . . MCL 333.7214.

"(9) If a person is convicted of violating subsection (1) or (8), all of the following apply:

(a) Except as otherwise provided in subdivisions (b) and (c), the person is guilty of a misdemeanor punishable by 1 or more of the following:

(*i*) Community service for not more than 360 hours.

(*ii*) Imprisonment for not more than 93 days.

(*iii*) A fine of not less than $100.00 or more than $500.00.

(b) If the violation occurs within 7 years of a prior conviction, the person shall be sentenced to pay a fine of not less than $200.00 or more than $1,000.00 and 1 or more of the following:

(*i*) Imprisonment for not less than 5 days or more than 1 year. Not less than 48 hours of the term of imprisonment imposed under this subparagraph shall be served consecutively.

(*ii*) Community service for not less than 30 days or more than 90 days.

(c) If the violation occurs within 10 years of 2 or more prior convictions, the person is guilty of a felony and shall be sentenced to pay a fine of not less than $500.00 or more than $5,000.00 and to either of the following:

(*i*) Imprisonment under the jurisdiction of the department of corrections for not less than 1 year or more than 5 years.

(*ii*) Probation with imprisonment in the county jail for not less than 30 days or more than 1 year and community service for not less than 60 days or more than 180 days. Not less than 48 hours of the imprisonment imposed under this subparagraph shall be served consecutively.

(d) A term of imprisonment imposed under subdivision (b) or (c) shall not be suspended." MCL 257.625(1), (8), and (9)(a)–(d).

In addition to the penalties set forth above, the court may order the offender to pay the costs of prosecution. MCL 257.625(13).

2003 PA 61 changed the terminology in the drunk driving statutes from "intoxicating liquor" to "alcoholic liquor." "Alcoholic liquor" is defined as "any spirituous, vinous, malt, or fermented liquor, liquids and compounds, whether or not medicated, proprietary, patented, and by whatever name called, containing 1/2 of 1% or more of alcohol by volume which are fit for use for beverage purposes as defined and classified by the commission according to alcoholic content as belonging to 1 of the varieties defined in [the Michigan Liquor Control Code of 1998]." MCL 257.1d and MCL 436.1105(2).

B. Elements

Note: The following criminal jury instructions may be used in cases involving these offenses:

CJI2d 15.1 Operating While Intoxicated—OWI

CJI2d 15.2 Elements Common to OWI and OWVI

CJI2d 15.3 Specific Elements of OWI

CJI2d 15.4 Specific Elements of OWVI

CJI2d 15.5 Factors in Considering OWI and OWVI

CJI2d 15.6 Possible Verdicts

CJI2d 15.7 Verdict Form

CJI2d 15.9 Defendant's Decision to Forgo Chemical Testing

1. Operating a Motor Vehicle Under the Influence of Alcoholic Liquor and/or a Controlled Substance

1) Defendant, whether licensed or not, operated a motor vehicle on the date in question.

2) Defendant operated a motor vehicle on a Michigan highway or other place open to the general public or generally accessible to motor vehicles, including an area designated for the parking.

3) At the time defendant operated the motor vehicle, defendant was under the influence of alcoholic liquor, a controlled substance, or a combination of both.

4) As a result, the defendant was substantially deprived of normal control or clarity of mind.*

5) Defendant was no longer able to operate a vehicle in a normal manner.

*This element was set forth by the Court of Appeals in *People v Raisanen*, 114 Mich App 840, 844 (1982).

2. Operating a Motor Vehicle with an Unlawful Bodily Alcohol Level

1) Defendant operated a motor vehicle on a Michigan highway or other place open to the general public or generally accessible to motor vehicles, including an area designated for parking.

2) At the time of operating the motor vehicle, defendant had an alcohol content of 0.08 grams or more per 100 milliliters of blood, per 210 liters of breath, or per 67 milliliters of urine.*

*On October 1, 2013, the blood-alcohol levels necessary for a UBAL conviction will revert to the prior level of 0.10. See 2003 PA 61.

3. Operating a Motor Vehicle with the Presence of a Controlled Substance

1) Defendant operated a motor vehicle on a Michigan highway or other place open to the general public or generally accessible to motor vehicles, including an area designated for parking.

2) At the time of operating the motor vehicle, defendant had in his or her body any amount of one of the controlled substances listed in either:

- Schedule 1 under MCL 333.7212 (or a rule promulgated under that section); or
- MCL 333.7214.

C. Licensing and Vehicle Sanctions

1. First-time Offenders

If the offender has no prior convictions within seven years, the Secretary of State must suspend his or her license for 180 days. MCL 257.319(8)(a). After the first 30 days of the suspension have elapsed, the Secretary of State may issue a restricted license during a specified portion of the suspension, if the person is otherwise eligible for a license. MCL 257.319(8)(a) and (15).

The Secretary of State will assess six points for a violation of §625(1) or (8) or a substantially corresponding local ordinance. MCL 257.320a(1)(c). For violations of §625(1), the Secretary of State will assess a $1000.00 driver responsibility fee each year for two consecutive years. MCL 257.732a(2)(a)(*iii*). For violations of §625(8), the Secretary of State will assess a $500.00 driver responsibility fee each year for two consecutive years. MCL 257.732a(2)(b)(*i*).

Upon conviction of a violation of §625(1) or (8) (or a local ordinance that substantially corresponds with it), the court may order vehicle immobilization for not more than 180 days, unless vehicle forfeiture is ordered. MCL 257.904d(1)(a) and 257.625(9)(e).

2. Offenders Who Violate §625(1) or (8) Within Seven Years of a Prior Conviction

Under MCL 257.303(5)(c) and (7), offenders convicted of violating §625(1) or (8) within seven years of another prior conviction listed in the statute will be subject to mandatory driver's license revocation for a minimum of one year. The Secretary of State must revoke the licenses* of §625(1) or (8) offenders who have one prior conviction for a violation or attempted violation of any of the following:

*If the offender does not have a driver's license, the Secretary of State must deny issuance of a license to the offender.

- OWI, under §625(1).
- OWVI, under §625(3).
- OWI or OWVI, causing death of another under §625(4).
- OWI or OWVI causing serious impairment of a body function of another, under §625(5).
- Being under 21 years of age and operating a vehicle with any bodily alcohol content, under §625(6) ("zero tolerance").
- Child endangerment, under §625(7).
- OWI, under §625(8).
- Any prior enactment of §625 in which the defendant operated a vehicle while under the influence of intoxicating or alcoholic liquor or a controlled substance, or a combination of intoxicating or alcoholic liquor and a controlled substance, or while visibly impaired, or with an unlawful bodily alcohol content.
- Former §625b, which provided criminal penalties for OWI.
- Operating a commercial motor vehicle with an unlawful bodily alcohol level, under §625m.

For a conviction under §625(1) or (8) within seven years after a prior conviction, the court shall order vehicle immobilization for not less than 90 days or more than 180 days. MCL 257.904d(1)(c). Forfeiture may be ordered in the court's discretion if the offender has an ownership interest in the vehicle used in the offense. The court may order that a leased vehicle be returned to the lessor. MCL 257.625n.

A "conviction" includes "a juvenile adjudication, probate court disposition, or juvenile disposition. . . ." MCL 257.8a(a). "Juvenile adjudication" refers to delinquency adjudications in other states. MCL 257.23a(b). "Probate court disposition" and "juvenile disposition" mean a disposition entered under MCL 712A.18. MCL 257.23b and 257.44a.

3. Offenders Who Violate §625(1) or (8) Within Ten Years of Two or More Prior Convictions

*If the offender does not have a driver's license, the Secretary of State must deny issuance of a license to the offender.

Under MCL 257.303(5)(g) and (7), offenders convicted of violating §625(1) or (8) within ten years of two other prior convictions listed in the statute will be subject to mandatory driver's license* revocation for a minimum of five years. The Secretary of State must revoke the licenses of §625(1) or (8) offenders who have two prior convictions of the following violations or attempted violations, if the convictions resulted from arrest on or after January 1, 1992:

- OWI under §625(1).
- OWVI under §625(3).
- OWI or OWVI causing death of another, under §625(4).
- OWI or OWVI causing serious impairment of a body function of another, under §625(5).
- Being under 21 years of age and operating a vehicle with any bodily alcohol content, under §625(6) ("zero tolerance"). (Only one zero tolerance violation may be considered for purposes of license revocation under the statute.)
- Child endangerment, under §625(7).
- OWI under §625(8).
- Any prior enactment of §625 in which the defendant operated a vehicle while under the influence of intoxicating or alcoholic liquor or a controlled substance, or a combination of intoxicating or alcoholic liquor and a controlled substance, or while visibly impaired, or with an unlawful bodily alcohol content.
- Former §625b, which provided criminal penalties for OWI.
- Operating a commercial motor vehicle with an unlawful bodily alcohol level, under §625m.

For a conviction under §625(1) or (8) within ten years after two or more prior convictions, the court shall order vehicle immobilization for not less than one year or more than three years, unless the vehicle is forfeited. MCL 257.904d(1)(d). Forfeiture may be ordered in the court's discretion if the offender has an ownership interest in the vehicle used in the offense. The court may order that a leased vehicle be returned to the lessor. MCL 257.625n.

The Secretary of State must refuse issuance of a certificate of title, a registration, or a transfer of registration for a vehicle if the driver's license of the vehicle's owner or lessee is suspended, revoked, or denied for a third or subsequent violation of §625 or §625m or a local ordinance substantially

corresponding to these sections. MCL 257.219(1)(d). This provision also applies to co-owners and co-lessees of the vehicle.

A "conviction" includes "a juvenile adjudication, probate court disposition, or juvenile disposition. . . ." MCL 257.8a(a). "Juvenile adjudication" refers to delinquency adjudications in other states. MCL 257.23a(b). "Probate court disposition" and "juvenile disposition" mean a disposition entered under MCL 712A.18. MCL 257.23b and 257.44a.

B. Issues

It is not necessary for a defendant to possess a driver's license in order to be convicted of OWI. MCL 257.625(1) and (8).

MCL 257.35a defines "operate" or "operating" as "being in actual physical control of a vehicle regardless of whether or not the person is licensed under [the Vehicle Code] as an operator or chauffeur." The Michigan Supreme Court considered the meaning of "operating" a vehicle in *People v Wood*, 450 Mich 399 (1995). In *Wood,* police found the defendant unconscious in his van at a restaurant drive-through window. The van's engine was running, the transmission was in drive, and the defendant's foot was on the brake pedal, which kept the van from moving. The Court held that the defendant was "operating" the vehicle for purposes of the OWI statute, MCL 257.625(1):

> "We conclude that 'operating' should be defined in terms of the danger the OUIL statute seeks to prevent: the collision of a vehicle being operated by a person under the influence of intoxicating liquor with other persons or property. Once a person using a motor vehicle as a motor vehicle has put the vehicle in motion, or in a position posing a significant risk of causing a collision, such a person continues to operate it until the vehicle is returned to a position posing no such risk." *Wood, supra* at 404–405.*

*In so holding, the Court overruled *People v Pomeroy* (On Rehearing), 419 Mich 441 (1984).

The Court of Appeals has affirmed OWI convictions in cases where there was circumstantial evidence to prove that a defendant was operating a vehicle while under the influence of intoxicants at some time prior to arrest. See *People v Schinella*, 160 Mich App 213, 216 (1987) (defendant found in a car straddling a ditch with the engine turned off, under circumstances indicating attempts to dislodge the vehicle before police arrived), and *People v Smith*, 164 Mich App 767, 770 (1987) (defendant found unconscious in a car on the highway shoulder 1/4 mile from the nearest exit, with the transmission in park and the motor running). But compare *People v Burton,* 252 Mich App 130, 143 (2002) (the evidence was insufficient to support a conviction of attempted OWI where defendant admitted to driving across a parking lot before parking the car and falling asleep with the engine running).*

**Burton* is dicussed in Section 6.1.

See also CJI2d 15.11, 15.12 (OWI or OWVI causing death, serious impairment of a body function), which state that "[o]perating means driving or having actual physical control of the vehicle."

Persons charged with and convicted of operating a motor vehicle under the influence of a controlled substance are treated and sentenced just the same as persons who are charged with operating a motor vehicle under the influence of alcohol. MCL 257.625(1)(a). In *People v Prehn*, 153 Mich App 532 (1986), the Court of Appeals addressed a situation where a defendant had ingested a combination of alcohol and a prescription drug. The information filed in *Prehn* stated only that the defendant had driven under the influence of alcohol; however, the trial court gave the following instruction in response to a question from the jury about the interaction of the drug with alcohol:

> "The defendant...can only be convicted of [OWI] if it is proved beyond a reasonable doubt that he was under the influence of intoxicating liquor at the time he was operating a motor vehicle. He is not charged with driving while under the influence of prescription drugs...and...cannot be convicted if he was intoxicated, and his intoxication was solely caused by his consumption of drugs or medication.
>
> "If, however, it is proven beyond a reasonable doubt that the defendant was intoxicated while driving the motor vehicle...and that such intoxication was due to the combined effect of prescription drugs...then the defendant may be convicted of driving under the influence of intoxicating liquor, even though the amount of intoxicating liquor consumed would not alone, absent the effect of the prescription drugs...have rendered him intoxicated to the extent described in the [previous] jury instructions I have given you defining this offense." *Id.* at 533-534.

The Court of Appeals disagreed with the defendant's assertion on appeal that the foregoing instruction amounted to an amendment of the information to include a new offense (i.e., OUID). The panel found that the jury could properly consider the effect of the prescription drug on the defendant's susceptibility to alcohol, just as it could consider the defendant's weight in determining whether the amount of alcohol he had consumed was sufficient to render him intoxicated. "The [trial court's] instruction merely clarified for the jury one of the factors which might be of relevance in determining defendant's guilt of the charged offense." *Id.* at 535.

"Under the influence" is defined in CJI2d 15.3 as follows:

> "'Under the influence of alcohol' means that because of drinking alcohol, the defendant's ability to operate a motor vehicle in a normal manner was substantially lessened. To

> be under the influence, a person does not have to be what is called 'dead drunk,' that is, falling down or hardly able to stand up. On the other hand, just because a person has drunk alcohol or smells of alcohol does not prove, by itself, that the person is under the influence of alcohol. The test is whether, because of drinking alcohol, the defendant's mental or physical condition was significantly affected and the defendant was no longer able to operate a vehicle in a normal manner."

In *People v Walters*, 160 Mich App 396, 403 (1987), the defendant Walters was charged with OWI and convicted by a jury of the lesser-included offense of driving while impaired. A police officer testified that he saw Walters drive about 30 feet along the road, stop, and back into a driveway. The officer said he did not notice anything abnormal about Walters's driving; however, Walters smelled of alcohol, his eyes were glazed and bloodshot, and he swayed slightly on his feet. On appeal from his conviction, Walters asserted that he could not be convicted of OWI or driving while impaired when the officer saw him driving normally. The Court of Appeals affirmed the conviction, holding that the circumstantial evidence presented was sufficient to establish that Walters was unable to drive normally. In so holding, the panel noted that "this case probably represents the low-water mark in the amount of evidence necessary to allow the submission of an OUIL charge to a jury. We do point out, however, that we have no difficulty in the submission of the DWI charge to the jury. The circumstantial evidence was clearly strong enough to allow the jury to consider a DWI charge." *Id.* at 405.

MCL 257.625(1)(b) creates a per se misdemeanor offense permitting conviction based solely on the defendant's bodily alcohol level, without regard to whether alcohol affected the defendant's ability to operate the vehicle. See *People v Calvin*, 216 Mich App 403, 407 (1996). UBAL is an alternative charge to OUIL. The prosecutor may charge both OUIL and UBAL as alternative theories, but the defendant can be convicted of only one of these offenses. Accordingly, the prosecutor should proceed on a single-count complaint alleging alternative theories for conviction. *People v Nicolaides*, 148 Mich App 100, 103 (1985).

6.10 Operating While Visibly Impaired (OWVI)—§625(3)

This section addresses the elements of and sanctions for offenses under §625(3), operating a vehicle while visibly impaired. OWVI is a lesser offense of OWI so that a defendant charged with OWI may be found guilty of OWVI. MCL 257.625(3).

A. Statute

> "(3) A person, whether licensed or not, shall not operate a vehicle upon a highway or other place open to the general

public or generally accessible to motor vehicles, including an area designated for the parking of vehicles, within this state when, due to the consumption of alcoholic liquor, a controlled substance, or a combination of alcoholic liquor and a controlled substance, the person's ability to operate the vehicle is visibly impaired. If a person is charged with violating subsection (1), a finding of guilty under this subsection may be rendered.

* * *

"(11) If a person is convicted of violating subsection (3), all of the following apply:

(a) Except as otherwise provided in subdivisions (b) and (c), the person is guilty of a misdemeanor punishable by 1 or more of the following:

(*i*) Community service for not more than 360 hours.

(*ii*) Imprisonment for not more than 93 days.

(*iii*) A fine of not more than $300.00.

(b) If the violation occurs within 7 years of 1 prior conviction, the person shall be sentenced to pay a fine of not less than $200.00 or more than $1,000.00, and 1 or more of the following:

(*i*) Imprisonment for not less than 5 days or more than 1 year. Not less than 48 hours of the term of imprisonment imposed under this subparagraph shall be served consecutively.

(*ii*) Community service for not less than 30 days or more than 90 days.

(c) If the violation occurs within 10 years of 2 or more prior convictions, the person is guilty of a felony and shall be sentenced to pay a fine of not less than $500.00 or more than $5,000.00 and either of the following:

(*i*) Imprisonment under the jurisdiction of the department of corrections for not less than 1 year or more than 5 years.

(*ii*) Probation with imprisonment in the county jail for not less than 30 days or more than 1 year and community service for not less than 60 days or more than 180 days. Not less than 48 hours of the

> imprisonment imposed under this subparagraph shall be served consecutively.
>
> (d) A term of imprisonment imposed under subdivision (b) or (c) shall not be suspended." MCL 257.625(3) and (11)(a)–(d).

In addition to the penalties set forth above, the court may order the offender to pay the costs of prosecution. MCL 257.625(13).

2003 PA 61 changed the terminology in the drunk driving statutes from "intoxicating liquor" to "alcoholic liquor." "Alcoholic liquor" is defined as "any spirituous, vinous, malt, or fermented liquor, liquids and compounds, whether or not medicated, proprietary, patented, and by whatever name called, containing 1/2 of 1% or more of alcohol by volume which are fit for use for beverage purposes as defined and classified by the commission according to alcoholic content as belonging to 1 of the varieties defined in this [the Michigan Liquor Code of 1998]." MCL 257.1d and MCL 436.1105(2).

B. Elements

> **Note:** The following criminal jury instructions may be used in OWVI cases:
>
> CJI2d 15.2 Elements Common to OWI and OWVI
>
> CJI2d 15.4 Specific Elements of OWVI
>
> CJI2d 15.5 Factors in Considering OWI and OWVI
>
> CJI2d 15.6 Possible Verdicts
>
> CJI2d 15.7 Verdict Form
>
> CJI2d 15.9 Defendant's Decision to Forgo Chemical Testing

The elements of OWVI are as follows:

1) Defendant, whether licensed or not, operated a motor vehicle on the date in question.

2) Defendant operated a motor vehicle on a Michigan highway or other place open to the general public or generally accessible to motor vehicle, including an area designated for the parking of vehicles.

3) Defendant had consumed alcoholic liquor, a controlled substance, or a combination of alcoholic liquor and a controlled substance.

4) Because of the consumption of alcoholic liquor and/or a controlled substance, defendant's ability to operate the vehicle was visibly impaired.

C. Licensing and Vehicle Sanctions

1. First-time Offenders

If there are no prior convictions within seven years and the offender's impairment was due to alcohol alone, the Secretary of State shall suspend the offender's license for 90 days. The period of suspension is increased to 180 days if the impairment was caused by consumption of a controlled substance or a combination of alcoholic liquor and controlled substance. MCL 257.319(8)(b). The offender may be issued a restricted license during all or a specified portion of the suspension, if he or she is otherwise eligible for a license. MCL 257.319(8)(b).

The Secretary of State will assess four points for a violation of §625(3) or a law or local ordinance substantially corresponding to it. MCL 257.320a(1)(i). The Secretary of State will assess a $500.00 driver responsibility fee each year for two consecutive years. MCL 257.732a(2)(b)(*i*).

Upon conviction of a first offense under §625(3) or a local ordinance substantially corresponding to it, the court may in its discretion order vehicle immobilization for not more than 180 days, unless vehicle forfeiture is ordered. MCL 257.904d(1)(a) and MCL 257.625(11)(e).

2. Repeat Offenders—Violation Within Seven Years of One Prior Conviction

*If the offender does not have a driver's license, the Secretary of State must deny issuance of a license to the offender.

Under MCL 257.303(5)(c) and (7), offenders convicted of violating §625(3) within seven years of another prior conviction listed in the statute will be subject to mandatory driver's license* revocation for a minimum of one year. The Secretary of State must revoke the licenses of §625(3) offenders who have one prior conviction of any the following violations or attempted violations:

- OWI under §625(1).
- OWVI under §625(3).
- OWI or OWVI causing death of another under §625(4).
- OWI or OWVI causing serious impairment of a body function of another under §625(5).
- Being under 21 years of age and operating a vehicle with any bodily alcohol content under §625(6) ("zero tolerance").
- Child endangerment under §625(7).

- OWI under §625(8).
- Any prior enactment of §625 in which the defendant operated a vehicle while under the influence of intoxicating or alcoholic liquor or a controlled substance, or a combination of intoxicating or alcoholic liquor and a controlled substance, or while visibly impaired, or with an unlawful bodily alcohol content.
- Former §625b, which provided criminal penalties for OWI.
- Operating a commercial motor vehicle with an unlawful bodily alcohol level, under §625m.

For a conviction under §625(3) within seven years after a prior conviction, the court shall order vehicle immobilization for not less than 90 days or more than 180 days, unless forfeiture is ordered. MCL 257.904d(1)(c). Forfeiture may be ordered in the court's discretion if the offender has an ownership interest in the vehicle used in the offense. The court may order that a leased vehicle be returned to the lessor. MCL 257.625n.

A "conviction" includes "a juvenile adjudication, probate court disposition, or juvenile disposition. . . ." MCL 257.8a(a). "Juvenile adjudication" refers to delinquency adjudications in other states. MCL 257.23a(b). "Probate court disposition" and "juvenile disposition" mean a disposition entered under MCL 712A.18. MCL 257.23b and 257.44a.

3. Repeat Offenders—Violation Within Ten Years of Two or More Prior Convictions

Under MCL 257.303(5)(g) and (7), offenders convicted of violating §625(3) within ten years of two other prior convictions listed in the statute will be subject to mandatory driver's license* revocation for a minimum of five years. The Secretary of State must revoke the licenses of §625(3) offenders who have two prior convictions of the following violations or attempted violations, if the convictions resulted from arrest on or after January 1, 1992:

*If the offender does not have a driver's license, the Secretary of State must deny issuance of a license to the offender.

- OWI under §625(1).
- OWVI under §625(3).
- OWI or OWVI causing death of another, under §625(4).
- OWI or OWVI causing serious impairment of a body function of another under §625(5).
- Being under 21 years of age and operating a vehicle with any bodily alcohol content under §625(6) ("zero tolerance"). (Only one zero tolerance violation may be considered for purposes of license revocation under the statute.)
- Child endangerment under §625(7).

- OWI under §625(8).
- Any prior enactment of §625 in which the defendant operated a vehicle while under the influence of intoxicating or alcoholic liquor or a controlled substance, or a combination of intoxicating or alcoholic liquor and a controlled substance, or while visibly impaired, or with an unlawful bodily alcohol content.
- Former §625b, which provided criminal penalties for OWI.
- Operating a commercial motor vehicle with an unlawful bodily alcohol level, under §625m.

For a conviction under §625(3) within ten years after two or more prior convictions, the court shall order vehicle immobilization for not less than one year or more than three years, unless the vehicle is forfeited. MCL 257.904d(1)(d). Forfeiture may be ordered in the court's discretion if the offender has an ownership interest in the vehicle used in the offense. The court may order that a leased vehicle be returned to the lessor. MCL 257.625n.

The Secretary of State must refuse issuance of a certificate of title, a registration, or a transfer of registration for a vehicle if the driver's license of the vehicle's owner or lessee is suspended, revoked, or denied for a third or subsequent violation of §625 or §625m or a local ordinance substantially corresponding to these sections. MCL 257.219(1)(d). This provision also applies to co-owners and co-lessees of the vehicle.

A "conviction" includes "a juvenile adjudication, probate court disposition, or juvenile disposition. . . ." MCL 257.8a(a). "Juvenile adjudication" refers to delinquency adjudications in other states. MCL 257.23a(b). "Probate court disposition" and "juvenile disposition" mean a disposition entered under MCL 712A.18. MCL 257.23b and 257.44a.

C. Issues

It is not necessary for a defendant to possess a driver's license in order to be convicted of OWI. MCL 257.625(3).

MCL 257.35a defines "operate" or "operating" as "being in actual physical control of a vehicle regardless of whether or not the person is licensed under [the Vehicle Code] as an operator or chauffeur." The Michigan Supreme Court considered the meaning of "operating" a vehicle in *People v Wood*, 450 Mich 399 (1995). In *Wood,* police found the defendant unconscious in his van at a restaurant drive-through window. The van's engine was running, the transmission was in drive, and the defendant's foot was on the brake pedal, which kept the van from moving. The Court held that the defendant was "operating" the vehicle for purposes of the OWI statute, MCL 257.625(1):

> "We conclude that 'operating' should be defined in terms of the danger the OUIL statute seeks to prevent: the collision of a vehicle being operated by a person under the influence of intoxicating liquor with other persons or property. Once a person using a motor vehicle as a motor vehicle has put the vehicle in motion, or in a position posing a significant risk of causing a collision, such a person continues to operate it until the vehicle is returned to a position posing no such risk." *Wood, supra* at 404–405.*

*In so holding, the Court overruled *People v Pomeroy* (On Rehearing), 419 Mich 441 (1984).

The Court of Appeals has affirmed OWI convictions in cases where there was circumstantial evidence to prove that a defendant was operating a vehicle while under the influence of intoxicants at some time prior to arrest. See *People v Schinella*, 160 Mich App 213, 216 (1987) (defendant found in a car straddling a ditch with the engine turned off, under circumstances indicating attempts to dislodge the vehicle before police arrived), and *People v Smith*, 164 Mich App 767, 770 (1987) (defendant found unconscious in a car on the highway shoulder 1/4 mile from the nearest exit, with the transmission in park and the motor running). But compare *People v Burton,* 252 Mich App 130, 143 (2002) (the evidence was insufficient to support a conviction of attempted OWI where defendant admitted to driving across a parking lot before parking the car and falling asleep with the engine running).*

**Burton* is dicussed in Section 6.1.

See also CJI2d 15.11, 15.12 (OWI or OWVI causing death, serious impairment of a body function), which state that "[o]perating means driving or having actual physical control of the vehicle."

In *People v Prehn*, 153 Mich App 532 (1986), the Court of Appeals addressed a situation where a defendant convicted of OWVI had ingested a combination of alcohol and a prescription drug. The information filed in *Prehn* stated only that the defendant had driven under the influence of alcohol; however, the trial court gave the following instruction in response to a question from the jury about the interaction of the drug with alcohol:

> "The defendant...can only be convicted of [OWI] if it is proved beyond a reasonable doubt that he was under the influence of intoxicating liquor at the time he was operating a motor vehicle. He is not charged with driving while under the influence of prescription drugs...and...cannot be convicted if he was intoxicated, and his intoxication was solely caused by his consumption of drugs or medication.
>
> "If, however, it is proven beyond a reasonable doubt that the defendant was intoxicated while driving the motor vehicle...and that such intoxication was due to the combined effect of prescription drugs...then the defendant may be convicted of driving under the influence of intoxicating liquor, even though the amount of intoxicating

> liquor consumed would not alone, absent the effect of the prescription drugs...have rendered him intoxicated to the extent described in the [previous] jury instructions I have given you defining this offense.
>
> "The same principle apples to the lesser included offense of operating a motor vehicle while [impaired]." *Id.* at 533-534.

The Court of Appeals disagreed with the defendant's assertion on appeal that the foregoing instruction amounted to an amendment of the information to include a new offense (i.e., OUID). The panel found that the jury could properly consider the effect of the prescription drug on the defendant's susceptibility to alcohol, just as it could consider the defendant's weight in determining whether the amount of alcohol he had consumed was sufficient to render him intoxicated. "The [trial court's] instruction merely clarified for the jury one of the factors which might be of relevance in determining defendant's guilt of the charged offense." *Id.* at 535.

The Michigan Supreme Court has defined visible impairment as follows:

> "[The] defendant's ability to drive was so weakened or reduced by consumption of intoxicating liquor that defendant drove with less ability than would an ordinary, careful and prudent driver. Such weakening or reduction of ability to drive must be visible to an ordinary, observant person." *People v Lambert*, 395 Mich 296, 305 (1975), cited in *People v Calvin*, 216 Mich App 403, 407 (1996). See also CJI 2d 15.4.

The degree of a person's intoxication for purposes of §625(3) may be established by chemical analysis tests of the person's blood, breath, or urine, or by testimony of someone who saw the impaired driving. *Calvin*, *supra* at 407-408.

Circumstantial evidence may also be used to establish that a person was driving while visibly impaired. In *People v Walters*, 160 Mich App 396, 403 (1987), the defendant Walters was charged with OWI and convicted by a jury of the lesser-included offense of driving while impaired. A police officer testified that he saw Walters drive about 30 feet along the road, stop, and back into a driveway. The officer said he did not notice anything abnormal about Walters's driving; however, Walters smelled of alcohol, his eyes were glazed and bloodshot, and he swayed slightly on his feet. On appeal from his conviction, Walters asserted that he could not be convicted of OWI or driving while impaired when the officer saw him driving normally. The Court of Appeals affirmed the conviction, holding that the circumstantial evidence presented was sufficient to establish that Walters was unable to drive normally. In so holding, the panel noted that "this case probably represents the low-water mark in the amount of evidence necessary to allow the submission

of an OUIL charge to a jury. We do point out, however, that we have no difficulty in the submission of the DWI charge to the jury. The circumstantial evidence was clearly strong enough to allow the jury to consider a DWI charge." *Id.* at 405.

6.11 "Zero Tolerance" Violations—§625(6)

A. Statute

"(6) A person who is less than 21 years of age, whether licensed or not, shall not operate a vehicle upon a highway or other place open to the general public or generally accessible to motor vehicles, including an area designated for the parking of vehicles, within this state if the person has any bodily alcohol content. As used in this subsection, "any bodily alcohol content" means either of the following:

(a) An alcohol content of not less than 0.02 grams or more but less than 0.08 grams per 100 milliliters of blood, per 210 liters of breath, or per 67 milliliters of urine, or, beginning October 1, 2013, the person has an alcohol content of not less than 0.02 grams or more but less than 0.10 grams per 100 milliliters of blood, per 210 liters of breath, or per 67 milliliters of urine.

"(b) Any presence of alcohol within a person's body resulting from the consumption of alcoholic liquor, other than consumption of alcoholic liquor as a part of a generally recognized religious service or ceremony."

* * *

"(12) If a person is convicted of violating subsection (6), all of the following apply:

(a) Except as otherwise provided in subdivision (b), the person is guilty of a misdemeanor punishable by 1 or both of the following:

(*i*) Community service for not more than 360 hours.

(*ii*) A fine of not more than $250.00.

(b) If the violation occurs within 7 years of 1 or more prior convictions, the person may be sentenced to 1 or more of the following:

(*i*) Community service for not more than 60 days.

(*ii*) A fine of not more than $500.00.

(*iii*) Imprisonment for not more than 93 days." MCL 257.625(6) and (12)(a)–(b).

In addition to the penalties set forth above, the court may order the offender to pay the costs of prosecution. MCL 257.625(13).

B. Elements

1) The defendant, whether licensed or not, operated a motor vehicle on the date in question.

2) The defendant operated the vehicle on a Michigan highway or other place open to the public or generally accessible to motor vehicles, including a designated parking area.

3) The defendant was less than 21 years of age.

4) The defendant had "any bodily alcohol content."*

*See Section 6.4(B), above, for the definition of "any bodily alcohol content."

C. Licensing Sanctions

The discussion below sets forth the licensing sanctions imposed for first-time and repeat offenders convicted of violating §625(6). The Motor Vehicle Code imposes no vehicle sanctions (i.e., immobilization or forfeiture) for §625(6) violations.

1. First-time Offender

After a violation of §625(6), the Secretary of State must suspend a person's driver's license for 30 days if the person has no prior convictions within seven years. MCL 257.319(8)(c). The Secretary of State may issue the person a restricted license during all or a specified portion of suspension, if the person is otherwise eligible for a license. MCL 257.319(8)(c) and (15).

The Secretary of State will assess four points for a violation of §625(6) or a law or local ordinance substantially corresponding to it. MCL 257.320a(1)(i). The Secretary of State will assess a $500.00 driver responsibility fee each year for two consecutive years. MCL 257.732a(2)(b)(*i*).

2. Second-time Offenders of §625(6)

If the person has one or more prior convictions of §625(6) within seven years, the Secretary of State must suspend a person's driver's license for 90 days upon conviction of another violation of §625(6). MCL 257.319(8)(d). There is no provision in the statute for issuing a restricted license to persons subject to this 90-day suspension.

The Secretary of State will assess four points for a violation of §625(6) or a law or local ordinance substantially corresponding to it. MCL 257.320a(1)(i). The Secretary of State will assess a $500.00 driver responsibility fee each year for two consecutive years. MCL 257.732a(2)(b)(*i*).

A "conviction" includes "a juvenile adjudication, probate court disposition, or juvenile disposition. . . ." MCL 257.8a(a). "Juvenile adjudication" refers to delinquency adjudications in other states. MCL 257.23a(b). "Probate court disposition" and "juvenile disposition" mean a disposition entered under MCL 712A.18. MCL 257.23b and 257.44a.

3. Offenders Who Violate §625(6) Within Seven Years of a Prior Conviction

Under MCL 257.303(5)(c) and (7), offenders convicted of violating §625(6)* within seven years of another prior conviction listed in the statute will be subject to mandatory driver's license revocation for a minimum of one year. The Secretary of State must revoke the licenses of §625(6) offenders who have one prior conviction of any of the following:

*MCL 257.303(5)(c) also includes a conviction of an attempted violation of §625(6).

- OWI under §625(1).
- OWVI under §625(3).
- OWI or OWVI causing death of another under §625(4).
- OWI or OWVI causing serious impairment of a body function of another under §625(5).
- Child endangerment under §625(7).
- OWI under §625(8).
- Any prior enactment of §625 in which the defendant operated a vehicle while under the influence of intoxicating or alcoholic liquor or a controlled substance, or a combination of intoxicating or alcoholic liquor and a controlled substance, or while visibly impaired, or with an unlawful bodily alcohol content.
- Former §625b, which provided criminal penalties for OWI.
- Operating a commercial motor vehicle with an unlawful bodily alcohol level, under §625m.

3. Offenders Who Violate §625(6) Within Ten Years of Two or More Prior Convictions

Under MCL 257.303(5)(g) and (7), offenders convicted of violating §625(6) within ten years of two other prior convictions listed in the statute will be subject to mandatory driver's license revocation for a minimum of five years. The Secretary of State must revoke the licenses of §625(6) offenders* who

*This also includes offenders convicted of an attempted violation of §625(6).

have two prior convictions of the following violations or attempted violations, if the convictions resulted from arrest on or after January 1, 1992:

- OWI under §625(1).
- OWVI under §625(3).
- OWI or OWVI causing death of another, under §625(4).
- OWI or OWVI causing serious impairment of a body function of another under §625(5).
- Child endangerment under §625(7).
- OWI under §625(8).
- Any prior enactment of §625 in which the defendant operated a vehicle while under the influence of intoxicating or alcoholic liquor or a controlled substance, or a combination of intoxicating or alcoholic liquor and a controlled substance, or while visibly impaired, or with an unlawful bodily alcohol content.
- Former §625b, which provided criminal penalties for OWI.
- Operating a commercial motor vehicle with an unlawful bodily alcohol level, under §625m.

The Secretary of State must refuse issuance of a certificate of title, a registration, or a transfer of registration for a vehicle if the driver's license of the vehicle's owner or lessee is suspended, revoked, or denied for a third or subsequent violation of §625 or §625m or a local ordinance substantially corresponding to these sections. MCL 257.219(1)(d). This provision also applies to co-owners and co-lessees of the vehicle.

A "conviction" includes "a juvenile adjudication, probate court disposition, or juvenile disposition. . . ." MCL 257.8a(a). "Juvenile adjudication" refers to delinquency adjudications in other states. MCL 257.23a(b). "Probate court disposition" and "juvenile disposition" mean a disposition entered under MCL 712A.18. MCL 257.23b and 257.44a.

D. Issues

MCL 257.35a defines "operate" or "operating" as "being in actual physical control of a vehicle regardless of whether or not the person is licensed under [the Vehicle Code] as an operator or chauffeur." The Michigan Supreme Court considered the meaning of "operating" a vehicle in *People v Wood*, 450 Mich 399 (1995). In *Wood,* police found the defendant unconscious in his van at a restaurant drive-through window. The van's engine was running, the transmission was in drive, and the defendant's foot was on the brake pedal, which kept the van from moving. The Court held that the defendant was "operating" the vehicle for purposes of the OWI statute, MCL 257.625(1):

> "We conclude that 'operating' should be defined in terms of the danger the OUIL statute seeks to prevent: the collision of a vehicle being operated by a person under the influence of intoxicating liquor with other persons or property. Once a person using a motor vehicle as a motor vehicle has put the vehicle in motion, or in a position posing a significant risk of causing a collision, such a person continues to operate it until the vehicle is returned to a position posing no such risk." *Wood, supra* at 404–405.*

*In so holding, the Court overruled *People v Pomeroy* (On Rehearing), 419 Mich 441 (1984).

The Court of Appeals has affirmed OWI convictions in cases where there was circumstantial evidence to prove that a defendant was operating a vehicle while under the influence of intoxicants at some time prior to arrest. See *People v Schinella*, 160 Mich App 213, 216 (1987) (defendant found in a car straddling a ditch with the engine turned off, under circumstances indicating attempts to dislodge the vehicle before police arrived), and *People v Smith*, 164 Mich App 767, 770 (1987) (defendant found unconscious in a car on the highway shoulder 1/4 mile from the nearest exit, with the transmission in park and the motor running). But compare *People v Burton,* 252 Mich App 130, 143 (2002) (the evidence was insufficient to support a conviction of attempted OWI where defendant admitted to driving across a parking lot before parking the car and falling asleep with the engine running).*

**Burton* is dicussed in Section 6.1.

See also CJI2d 15.11, 15.12 (OWI or OWVI causing death, serious impairment of a body function), which state that "[o]perating means driving or having actual physical control of the vehicle."

In *People v Haynes*, 256 Mich App 341, 345–49 (2003), the Court of Appeals upheld the use of a prior uncounselled juvenile adjudication for a "zero tolerance" violation for the purposes of enhancement. The Court held that "a trial court may consider prior juvenile delinquency adjudications obtained without the benefit of counsel in determining a defendant's sentence where the prior adjudication did not result in imprisonment." *Id.* at 348–49. The Court reaffirmed existing case law permitting use of prior uncounselled misdemeanor convictions for enhancement where counsel was not required for the prior offenses or where the prior adjudications did not result in imprisonment. *People v Reichenbach,* 459 Mich 109 (1998)*; People v Daoust,* 228 Mich App 1, 17–19 (1998).

In a prosecution for a violation of §625(6), the defendant bears the burden of proving that the consumption of intoxicating liquor was a part of a generally recognized religious service or ceremony by a preponderance of the evidence. MCL 257.625(22).